753 And afterwards to-wit: on the 5th day of June, A. D. 1907, there was filed in said Circuit Court the Mandate of the United States Circuit Court of Appeals for the Eighth Circuit in said cause, which said Mandate is in words and figures, as follows, to-wit:

(Mandate of Court of Appeals, Eighth Circuit.)

United States of America—ss.

The President of the United States of America, to the Honorable the Judges of the Circuit Court of the United States for the Eastern District, of Missouri—Greeting:

(Seal)

Whereas, lately in the Circuit Court of the United States for the Eastern District of Missouri, before you, or some of you, in a cause between the Central Trust Company of New York, et al., complainants, and the Wabash, St. Louis and Pacific Railway Company, et al., defendants, and wherein the St. Louis, Kansas City and Colorado Railroad Company filed its intervening petition against the Wabash Railroad Company, et al., and wherein the decree of the said Circuit Court in said cause, entered on the 2nd day of April A. D. 1906, is in the following words, viz:

"This cause came on for final hearing this 2nd day of April, 1906, upon the motion and application of the St. Louis, Kansas City and Colorado Railroad Company. The parties appeared by counsel. The intervenor appeared by M. A. Low, W. F. Evans and Frank Hagerman, its Solicitors; and the Wabash Railroad Company appeared by Wells H. Blodgett, H.
754 S. Priest, C. N. Travous and J. L. Minnis, its Solicitors.

The cause was submitted upon the bound volume of testimony in this cause, entitled and designated "Pleadings and Evidence," and two plats marked "Chart A," and "Exhibit D," respectively and the court having heard the arguments of counsel, and being fully advised in the premises, orders, adjudges and decrees:

The decree of December 31st, 1886, set out in the intervenor's application and motion is in full force and effect, and is binding upon the St. Louis, Kansas City and Colorado Railroad Company, its successors and assigns, and upon the defendant, Wabash Railroad Company, its successors and assigns, and the said Wabash Railroad Company, its officers, agents and employes, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, and subject to the regulations therein set forth, the equal right to use, with the

engines and cars (loaded or empty) of the latter, the right of way, tracks, switches, side-tracks turnouts, turntables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street.

And it is further ordered, adjudged and decreed that the words, "tracks, switches, side-tracks, turnouts, turn-tables and other terminal facilities of the Wabash Railroad Company, in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street," as hereinbefore used, and as used in the original decree in this case correctly interpreted and
755 understood, mean only such tracks, switches, side-tracks, turnouts, turntables and terminal facilities as are or may be situate and located upon the strip of land forty-two (42) feet wide, commencing at the north line of Forest Park, where the railway of the Wabash Railroad Company enters said Park, thence along said strip, or right of way, on which the said railway is located, through said Park, and thence over a strip of land twenty-eight (28) or thirty (30) feet wide on which is located the said Railway, to said Eighteenth street, in the City of St. Louis, it being a continuous strip from the north line of Forest Park to said Eighteenth Street, and does not embrace any tracks of any kind not situate on said strip of land just described; and said Wabash Railroad Company, its officers, agents and employes are enjoined from refusing to permit such use, under the terms of said decree, and subject to the regulations therein set forth, by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns; the right to the use by the said St. Louis, Kansas City and Colorado Railroad Company which the said Wabash Railroad Company is enjoined to forthwith accord, and is enjoined from refusing, is not limited to the ingress and egress of said St. Louis, Kansas City & Colorado Railroad Company with its trains and cars to and from the north line of Forest Park to Eighteenth Street in St. Louis, Missouri, but does include in all respects, subject to the terms of said decree, as hereinbefore interpreted, and subject to the regulations therein set forth, the right to the equal use and benefit, (with its engines, cars and trains,) of all the right of way, tracks, switches, side-tracks, turnouts, turn-tables and other terminal facilities which are or may be situ-
756 ate as hereinbefore defined, and the right to so use the said terminal facilities between the points aforesaid for all purposes that they are now used, or are susceptible of being used by the said Wabash Railroad Company under the said regulations provided for in said original decree.

It is further ordered, adjudged and decreed that the St. Louis, Kansas City and Colorado Railroad Company and the Wabash

Railroad Company each pay its own costs and expenses in this proceeding, to be herein taxed, and that execution issue therefor.

No appeal shall supersede the injunctive portion of this decree.

JOHN H. ROGERS,
U. S. District Judge.

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit, by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears, And Whereas, in the present term of December, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said United States Circuit [—] of Appeals, on the transcript of record from said Circuit Court, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that the St. Louis, Kansas City and Colorado
757 Railroad Company have and recover against the Wabash Railroad Company, the sum of Three Hundred Eighty Two and 90/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to enter a decree not inconsistent with the views expressed in the opinion of this Court.

April 3, 1907.

United States Circuit Court of Appeals.

December Term, 1906. Eighth Circuit.

Costs of St. Louis, Kansas City and Colorado Railroad Company, Appellant in No. 2426.

December Term, 1905.

Filing record and docketing cause $5; filing 2 appearances at 25c, 50;	$ 5.50
Entering 2 appearances at 25c, 50; filing two receipts for record at 25c, 50;	1.00
2 papers at 25c, 50;	.50
Entering order, 20c; preparing record for printer, etc., $245.75; costs printing record, $90.00;	.20
	335.75

May Term, 1906.

Transfer $1; filing 2 appearances at 25c, 50; entering 2 appearances at 25c, 50c;	1.50
Entering 2 appearances at 25c, 50; filing 2 receipts for record at 25c, 50;	1.00
Filing 2 papers at 25c, 50;	.50

September Term, 1906.

Filing Briefs Appellant $5; filing briefs Appellee $5;	10.00

758 December Term, 1906.

Submission, 20c;	$ .20
Filing Opinion, 25c; decree $1; filing same, 25c; issuing mandate, $5;	6.50
Filing receipt for mandate, 25c; attorney's docket fee $20;	20.25
	$382.90

Attest:

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals for the Eighth Circuit.

Fee Book 5, Page 213.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable, Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Third day of June in the year of our Lord one thousand nine hundred and seven.

Costs of Appellant.

Clerk,	$ 27.15
Printing Record,	335.75
Attorney,	20.00
	$382.90

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

759 And, afterwards, to-wit: on the 18th day of December, A. D. 1907, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Order permitting Amendment of Intervening Petition.)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Central Trust Company, et al., Complainants,
2537 & 2464. vs.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants,
St. Louis, Kansas City & Colorado Railroad Company Intervenor.

By consent of parties, it is

Ordered that said intervenor have leave to file its amendment to its intervening petition as this day presented, which is now accordingly done.

DAVID P. DYER, Judge.

December 18th, 1907.

760 Which said Amendment to the Intervening Petition is in words and figures, as follows, to- wit:

(Amendment to Intervening Petition.)

In the Circuit Court of the United States for the Eastern District of Missouri.

Central Trust Company, et al., Complainants,
Nos. 2357 and 2464 vs. In Equity.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated.

Amendment to Petition of St. Louis, Kansas City and Colorado Railroad Company.

Now comes petitioner, and by leave of court, presents this its Amended Petition, and thereupon it avers:

1. Under the original petition herein, after hearing the evidence, this court did, on April 2, 1906, enter a decree in words and figures as follows:

761 "In the Circuit Court of the United States for the Eastern District of Missouri.

Central Trust Company, et al., Complainants,
#2357 and 2464. vs.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

In the matter of the interventing petition of the City of St. Louis, and St. Louis, Kansas City & Colorado Railroad Company.

Decree.

This cause came on for final hearing this 2nd day of April, 1906, upon the motion and application of the St. Louis, Kansas City and Colorado Railroad Company. The parties appeared by counsel. The intervenor appeared by M. A. Low, W. F. Evans and Frank Hagerman, its solicitors; and the Wabash Railroad Company appeared by Wells H. Blodgett, H. S. Priest, C. N. Travous and J. L. Minnis, its solicitors. The cause was submitted upon the bound volume of testimony in this cause, entitled and designated 'Pleadings and Evidence', and two plats marked "Chart A', and 'Exhibit D' respectively; and the court having heard the arguments of counsel, and being fully advised in the premises, orders, adjudges and decrees:

The decree of December 31, 1886, set out in the intervenor's application and motion, is in full force and effect, and
762 is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant, Wabash Railroad Company, its successors and assigns, and the said Wabash Railroad Company, its officers, agents and employes, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, and subject to the regulations therein set forth, the equal right to use, with the engines and cars (loaded or empty) of the latter, the right-of-way, tracks, switches, side-tracks, turnouts, turntables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street.

And it is further ordered, adjudged and decreed that the words 'tracks, switches, side-tracks, turnouts, turntables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street", as hereinbefore used, and as used in the original decree in this case, correctly interpreted and understood mean only such tracks, switches, side-tracks, turnouts, turn-tables and terminal facilities as are or may be situated and located upon the strip of land 42 feet wide, commencing at the north line of Forest Park, where the railway of the Wabash Railroad Company enters said Park; thence along said strip, or right of way, on which the said railway is located, through said park, and thence, over a strip of land 28 or 30 feet wide on which is located the said railway, to said Eighteenth street,
in the city of St. Louis, it being a continuous strip from
763 the north line of Forest Park to said Eighteenth street, and does not embrace any tracks of any kind not situate on said strip of land just described; and said Wabash Railroad Company, its officers, agents and employes are enjoined from

refusing to permit such use, under the terms of said decree, and subject to the regulations therein set forth, by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, the right to the use by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, which the said Wabash Railroad Company [in] enjoined to forthwith accord, and is enjoined from refusing is not limited to the ingress and egress of said St. Louis, Kansas City & Colorado Railroad Company with its trains, engines and cars to and from the north line of Forest Park to Eighteenth Street in St. Louis, Missouri, but does include in all respects, subject to the terms of said decree, as hereinbefore interpreted, and subject to the regulations therein set forth, the right to the equal use and benefits, with its engines, cars and trains, of all the right of way, tracks, switches, side-tracks, turnouts, turntables and other terminal facilities which are or may be situate as hereinbefore defined, and the right to so use the said terminal facilities between the points aforesaid for all purposes that they are now used, or are susceptible of being used by the said Wabash Railroad Company, under the said regulations provided for in said original decree.

It is further ordered, adjudged and decreed that the St. Louis, Kansas City & Colorado Railroad Company and the Wabash Railroad Company, each pay its own costs and
764 expenses in this proceeding, to be herein taxed, and that execution issue therefor.

No appeal shall supersede the injunctive portion of this decree.

JOHN H. ROGERS,
U. S. District Judge.

St. Louis, Mo., April 2nd, 1906."

2. From the said decree the petitioner prosecuted its appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, which, after a hearing, reversed and remanded said cause with directions to enter a decree not inconsistent with the views of that court as expressed in its opinion. Copies of said opinion and the mandate of that court are hereto attached, marked Exhibit "1" and "2" respectively, and made part hereof. The Court, in that opinion, among other things, held that under the decree of December 31st, 1886, set forth in the original petition, petitioner was entitled to enjoy the joint and equal use of the entire strip of land between the north line of Forest Park and Eighteenth Street, in St. Louis, Missouri, which the Wabash, St. Louis & Pacific Railroad Company owned or had acquired the right to use when said decree was rendered, and all tracks, side-tracks, turn-outs, turn-tables and terminal facilities now thereon, but was not

entitled to the use under that decree of any of the property, industrial or railroad facilities of the Wabash Railroad Company beyond the limits of that strip.

3. Petitioner is entitled to all the relief for which it prayed in its original petition, and neither the Circuit Court of
765 Appeals nor this court has any right to exclude it from the use and benefit under the decree of December 31, 1886, of the property, industrial or railroad facilities of the Wabash Railroad Company beyond the limits of the strip mentioned, and any such construction of said original decree fails to give full faith and credit thereto, to which petitioner is entitled under and by virtue of the following provisions of the constitution of the United States; Section 8, Article 1, Section 1 and 2, of Article III, Section I of Article V, and Article VI.

4. Petitioner therefore shows that this case arises under the constitution of the United States, and it hereby invokes the jurisdiction of this court for the protection to which it is thereunder entitled, and asks that under said constitutional provisions full faith and credit be given to said decree of December 31st, 1886, and that it be accorded all the relief for which it originally prayed, including the right under said decree to the equal use and benefit of the property industrial or railroad facilities, from which said opinion of the Circuit Court of Appeals attempts to exclude it, and petitioner will ever pray, etc.

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN.
Solicitors for Petitioner.

United States of America,
Eastern District of Missouri—ss.

I, W. F. Evans, upon my oath say, that I am one of the Solicitors and the General Attorney of the St. Louis,
766 Kansas City and Colorado Railroad Company, the petitioner above named, and as such make, and am authorized to make, this affidavit; that I have read the foregoing amendment to the petition in the above-entitled cause, and am acquainted with the contents thereof, and that the matters and things therein stated are true. I further state that the said amendment is not made for the purpose of vexation or delay, and that the matter of the said amendment is material and could not, with reasonable diligence, have been sooner introduced in the bill or petition.

W. F. EVANS.

State of Missouri,
City of St. Louis—ss.

Subscribed and sworn to before me, a Notary Public within and for the city and state aforesaid, this 16th day of December, A. D. 1907. My commission expires November 22, 1911.

(Seal) KATE L. WORLEY,
Notary Public.

The receipt of a copy of the foregoing amendment is hereby acknowkledged this .....day of October, 1907, and we consent to the filing of the same without further notice.

WELLS H. BLODGETT & J. L. MINNIS.
Solicitors for Wabash Railroad Co.

767 "Exhibit I".

United States Circuit Court of Appeals, Eighth Circuit.

December Term, A. D. 1906.

The St. Louis, Kansas City and Colorado Company, Appellant,
No. 2426. vs.
Wabash Railroad Company and City of St. Louis, Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. W. F. Evans and Mr. Frank Hagerman (Mr. E. S. Robert and Mr. M. A. Low were with them on the brief) for appellant.

Mr. J. L. Minnis (Mr. Wells H. Blodget, Mr. C. N. Travous and Mr. H. S. Priest were with him on brief) for appellee Wabash Railroad Company.

Before Sanborn, Hook and Adams, Circuit Judges.

Syllabus.

1. Railroads.—Right of Way.—Meaning.

The term, "right of way", when used to describe the real estate of a railroad company ordinarily signifies the entire strip of land which the corporation has found it necessary or convenient to acquire the right to use for railway pur-
768 poses, and it is not limited to the specific part thereof secured or used for its main track or other particular improvements.

2. Decree—Construction—Proof to Reasonable Certainty Requisite to Modify Ordinary Meaning and Effect.

When the terms of a decree are plain and free from ambiguity, their ordinary meaning and effect may not be lawfully extended or contracted by construction, in the absence of proof to a reasonable certainty that such was the purpose of the court, for the legal presumption is that the judge carefully expressed his deliberate intention therein.

3. Same—Intention to Make no Limitation Presumed from its Absence.

The absence from a decree of any limitation or exception to general terms of known significance raises a persuasive legal presumption that the court intended to make none.

4. Res Adjudicata—Every Matter Admissible in Former Suit on Same Cause Between Same Parties in Adjudicated.

In a second suit between the same parties on their privies upon the same cause of action not only every matter offered, but every admissible matter which might have been offered to sustain or defeat, in whole or in part, the cause of action, is rendered res adjudicata, by a former judgment upon the Merits.

769 5. Decree for Continuous Use—Enforcement Subject to Equities Subsequently Arising.

A court of equity may condition its decree for the enforcement of a former decree for the continuous use of a right of way or of terminal facilities by equitable terms, or may refuse to enforce it, where subsequent to the entry of the original decree such radical changes in the situation, rights, or relations of the parties have been wrought that equity demands such terms or forbids its enforcement.

But in the absence of such changes the original decree concludes the rights and remedies of the parties and it must be enforced.

6. Decree for Joint Use of Right of Way and Terminal Facilities — Interpretation — Enforcement — Facts — Conclusion.

In 1886 the Circuit Court rendered a decree that the Colorado Company should enjoy the joint and equal use of the "right of way, tracks, side tracks, switches, turnouts, turntables and other terminal facilities" of the Wabash company between the line of Forest Park and 18th street in the city of St. Louis, on reasonable terms fixed therein.

Held (1) this decree entitled the Colorado company to the joint use of the entire strip of land between the north line of

the park and 18th street which the Wabash company had acquired the right to use for railway purposes at the date of the decree and of all the tracks, side tracks, turnouts, turn-
770 tables and other terminal facilities thereon.

2. That decree was equitable and in the absence of proof of such a change of conditions since its entry as would render its enforcement unjust, the Colorado company is still entitled to the joint use of this entire strip and of all the tracks, side tracks, switches, turnouts, turntables, and other terminal facilities of the Wabash company which are now upon said strip.

3. But the Colorado company is not entitled under that decree to the use of the industrial tracks, land or other railway facilities of the Wabash company outside the limits of that strip, the use of which it had acquired at the date of the decree of 1886.

Sanborn, Circuit Judge, delivered the opinion of the court.

On December 31, 1886, upon a petition of intervention in the suit to foreclose the mortgages upon the Wabash, St. Louis & Pacific Railway Company, the court below rendered a decree to the effect that the St. Louis, Kansas City & Colorado Railway Company should have the joint use of the "right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth Street in the city of St. Louis" and that for this use it should pay 6 per cent. per annum upon $500,000, one-half of the value of this property, and its proportion of the cost of its main-
771 tenance upon a wheelage basis. The Wabash company appealed from this decree and it was affirmed by the Supreme Court. Central Trust Co. v. Wabash, St. Louis & Pacific R. Co., 29 Fed. 546; Joy v. St. Louis, 138 U. S. 1.

Eighteenth street runs north and south. The Union Station is located upon the west side of this street. The east line of Forest Park is about three miles west of 18th street. At the time this decree was rendered the Wabash, St. Louis & Pacific Railway Company owned a strip of land which varied in width from 30 feet to more than 200 feet and which extended from 18th street to the east line of the park and it also had an easement for the passage of its trains and engines upon a strip of land 42 feet wide through the park from the east side to the north side thereof. It had constructed and was operating a main track, side tracks, switches and terminal facilities upon

this property. Under this decree the Colorado company entered upon, and continued in the joint use of this main track and some of the side tracks, switches and terminal facilities until 1902, when the Wabash Railroad Company, which had succeeded to the rights of the Wabash, St. Louis & Pacific Railway Company, limited its use to that necessary for the ingress and egress of its trains to and from the station over the main track and the side tracks requisite for their passage. Thereupon the Colorado company applied to the court for an order that the Wabash company be required to permit it to use all the terminal facilities of that company between the north line of the park and 18th street, including its tracks,
772 switches, turnouts, and turntables. Issue was joined, testimony was taken and after a final hearing the court adjudged that the Colorado company was entitled, under the terms of the original decree, to the joint use of the tracks and railway facilities of the Wabash company upon that strip of land upon which the main track of the Wabash company was laid 42 feet in width through the park and only 28 or 30 feet in width from the east line of the park to 18th street and to the use of none of the other terminal facilities of the latter company. Central Trust Co. v. Wabash, St. Louis & Pacific R. Co., 144 Fed. 576. This decree is challenged by the appeal. The Colorado company asserts, and the Wabash company denies that the "right of way" meant by the original decree was the entire strip then owned by the Wabash company between the east line of the park and 18th street, and the real question in this case is whether the joint use decreed to the Colorado company in 1886 extended to the entire strip and the railway facilities thereon or was limited to that portion thereof 28 to 30 feet wide upon which the main track had been built and to the improvements upon this narrower strip.

The parts of the decree pertinent to this issue read in this way:

"And the court doth further find, order adjudge and decree that the equities are with said intervenors and said intervenors are entitled to the relief as prayed for in their amended bill of complaint herein.
773 And the Court finds, adjudges and decrees that the basis of compensation to be paid by the intervenor, the St. Louis, Kansas City & Colorado Railroad Company, for the use of right of way and tracks, side tracks, switches, turnouts, turntables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis, shall be the value of said right of way, tracks and other property last described as determined by the Mas-

ter in his said reports; and the compensation to be paid shall be per annum, six per cent. on one-half of the value of said right of way, tracks, side tracks, switches, turnouts, turntables and other terminal facilities, and the said one-half value is and shall be taken to be five hundred thousand dollars. * * * And the court doth further order, adjudge and decree that the running of all trains, engines or cars of said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, over said right of way, and tracks and the use of said right of way, road, terminal facilities and other property specified as aforesaid, shall conform to the rules and regulations now in force and such other reasonable rules and regulations as may hereafter be adopted. * * * And the court doth further order, adjudge and decree that in all respects subject to the terms of this decree the said railroad company, intervenor, shall enjoy the equal use and benefit of said right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities with said Wabash, St. Louis & Pacific Railway Company, or its said receivers, and the said Wabash, St. Louis & Pacific Railway Company.
774 * * * and all persons claiming by, through, or under them * * * are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervenor * * * from using with it for their engines and cars (loaded or empty) the said right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities of said Wabash, St. Louis, & Pacific Railway Company between the north line of said Forest Park and said Eighteenth street * * * And the said intervenor, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents and employes and each of them, is hereby authorized and permitted with its right of way, road, tracks, and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park and to use the said right of way, tracks, switches, side tracks, turnouts, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company, or any of claiming by, through or under it as to the same, between the north line of said park and Eighteenth street, on the terms, in the manner and subject to the regulations in this decree set forth in and for the transaction of the business and in the operation of the road of said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns."

The ordinary signification of the term "right of way" when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes is the entire strip or tract it owns or is entitled to use for this purpose and not

any specific or limited part thereof upon which its main track or other specified improvements are located. Joy v. St. 775 Louis, 138 U. S. 1, 44, 45, 46; Territory of New Mexico v. United States Trust Co., 172 U. S. 171, 181-2; 174 U. S. 545, 546; Chicago & Alton R. Co. v. People, 98 Ill., 350, 356-7; Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, 37 M. E. 660, 663; Pfaff v. Terre Haute & I. R. Co., 108 Ind. 144, 148, 9 N. E. 93, 95.

To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and 18th street Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and when the terms of a decree are plain and clear their ordinary meaning and effect may not be lawfully contracted or extended unless it appears with reasonable certainty that such was the purpose of the court, for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore assumed no light burden when it essayed to prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only 30 feet in width out of the wider strip the Wabash Company owned between the east line of the park and 18th street. Its contention in this respect is based upon the pleadings and proceedings in the intervention and upon the earlier relations of the parties and their predecessors in interest, and a brief statement of some of the salient facts which condition it is essential to its understanding, but reference is made to the opinion of 776 Mr. Justice Brewer who rendered the original decree, in 29 Fed. 546, and to the opinion of the Supreme Court in Joy v. St. Louis, 138 U. S. 1, for a detailed statement of the origin and history of the rights and litigation of these parties.

On August 11, 1875, the St. Louis County Railroad Company owned the title of or the easement to use about twelve isolated strips of land which varied in width and which now constitute parts of the entire strip of the Wabash Company east of the park and it claimed a right of way through the park. It had laid out, and it intended to build over these tracts a railroad from the north line of the park to 18th street. The St. Louis, Kansas City & Northern Railway Company, the predecessor in interest of the Wabash Company, was operating its railroad and was anxious to extend it through the park to the Union Station along this line. Thereupon, on this 11th

day of August, 1875, and as a part of the same transaction, these corporations made an agreement, the county company made a deed, and the two companies and the commissioners of Forest Park made a tripartite agreement whereby the county company agreed to, and did convey to the Kansas City company a strip 28 feet in width through each of its tracts between the east line of the park and Grand avenue, a strip 30 feet in width through each of its tracts between Grand Avenue and 18th street, and an undivided half of its right of way through the park, the park commissioners assured to the county company a right of way through the park 42 feet in width, the county company covenanted by the ninth paragraph of the tripartite agreement to "permit under such
777 reasonable regulations and terms as may be agreed upon other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid therefor as may be agreed upon by such companies" and the Kansas City company, as was subsequently held in 138 U. S. 1, accepted its right of way through the park subject to the condition in the 9th paragraph of the tripartite agreement that this right of way and also the right of way it might acquire east of the park to 18th street might be used by other railroads.

It is important to note and bear in mind the times when and the sources from which the Kansas City company and its successor, the Wabash company, acquired the title to the entire strip east of the park which it owned when the decree of 1886 was rendered and upon which it had then constructed and was operating its railroad. The isolated tracts owned by the county company in 1875 extended over less than one-half the distance between the park and 18th street. The Wabash company derived its title to strips 28 or 30 feet in width through those tracts under the county company's deed of August 11, 1875. It secured the remainder of them under a deed to the Kansas City company made in 1878. It acquired tracts between these isolated lands from third parties by purchase and condemnation and these tracts were of varying width and covered more than one-half of the length of the entire strip. Thus this strip was made up (1) of strips acquired in 1875 28 or 30 feet in width through the isolated tracts then owned by the county company which covered less than half of its
778 length (2) of the remainder of these isolated tracts deeded to the Kansas City company in 1878, and (3) of the tracts of land of varying width between these isolated tracts.

The court below seems to have over looked this fact, for it states as one of the controlling reasons for its conclusion that the right of way of the decree was only 28 or 30 feet in width east of the park, that "at the time the original decree was rendered the Wabash, St. Louis & Pacific Railway Company owned a right of way through Forest Park 42 feet wide, and a right of way 28 or 30 feet wide from Forest Park to the Union depot at Eighteenth street in St. Louis, Mo. It derived all this right of way through an instrument of writing spoken of in all this litigation as the 'tripartite agreement.' That this last statement is true is distinctly shown by the language of the Supreme Court of the United States in 138 U. S. at page 43, 11 Sup. Ct. at page 255, 34 L Ed. 843, in these words: 'The tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way!" The facts were, however, that at the time of the original decree the Wabash company not only had a right of way 28 or 30 feet in width east of the park, but a wider one, that it neither derived all of this right of way nor all of the alleged right of way 28 or 30 feet in width from the tripartite agreement, but it derived the former from the three sources which have been specified, a portion of the latter from the deed of the county company of August 11, 1875, the agreement of the two corporations of that date and the tripartite agreement, but the larger portion from third parties
779 by subsequent purchase and condemnation of the lands between the isolated tracts owned by the county company at that time, and that the tripartite agreement conveyed no title to, but imposed a condition upon the use of the Wabash company's right of way and property east of the park. The statement of the Supreme Court that "the tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way" was true only because it was their only muniment of title to that portion of the right of way through the park. The park commissioners never had any title to any of the property east of the park and they could have granted none. They claimed to have, and by the tripartite agreement they granted the right of way through the park upon the condition that their immediate and remote grantees would permit its use and the use of their right of way east of the park to 18th street by other railroads which might desire to enter the city over it. But the muniments of their title to the property east of the park were their deeds from former owners, and the tripartite agreement, instead of being a muniment of title to it, was an incumbrance upon it. Joy v. St. Louis, 138 U. S. 39, 40, 41, 42.

In 1886 the Colorado company filed its intervening petition and its amended petition, alleged that it was one of the "other

railroads" which the county company by the ninth paragraph of the tripartite agreement covenanted to permit to use its right of way through the park and up to the terminus of its railroad in the city of St. Louis, that the Wabash held its right of way from the north line of the park to 18th street subject to the condition expressed in that covenant, and prayed that the petitioner might enjoy the joint and equal use of it. The
780 Wabash company answered, among other things, that the alleged covenant and condition attached to those portions of the isolated tracts owned by the county company in 1875, which it still held after it had conveyed the 28 or 30 feet strips to the Kansas City company, and that those strips and the intermediate tracts which it had obtained by purchase and condemnation from third parties were exempt from them. But the court held otherwise and rendered the decree that the Colorado company should "enjoy the equal use and benefit of the right of way and the tracks, side tracks and switches, turnouts, turntables and other terminal facilities of the Wabash company between the north line of Forest Park and Eighteenth street." A sufficient statement of the origin and history of the rights of the parties and of the previous litigation has now been made to enable us to consider intelligently the reasons urged by counsel for the Wabash Company why this decree should be construed to mean the right of way of the Wabash company through the park; its right of way only 28 or 30 feet in width east of the park and its railway facilities thereon.

Their first contention is that the description in the decree of the right of way and railway facilities between the north line of the park and 18th street must be interpreted to mean "that strip of land which railways take upon which to construct their road-bed" and hence that on which the Wabash company had constructed its road-bed in 1886, because in the absence of that construction no land or property of the Wabash company could be found between the north line of the park and 18th street for the reason that the two lines run at right an-
781 gles. But this argument just as conclusively demonstrates that the right of way of the decree must be interpreted to have its ordinary signification, the entire strip which the Wabash company owned or had acquired the right to use for railroad purposes between the north line of the park and 18th street and the tracks and railway facilities thereon, and it fails to advance the investigation.

The second argument is that the right of way east of the park specified in the decree is limited by the prayer of the amended bill and this sentence in the decree: "And the court doth further find, order, adjudge and decree that the equities

are with the intervenors and said intervenors are entitled to the relief as prayed for in the amended bill." The prayer of the amended bill was that the Wabash Company be enjoined from preventing the Colorado Company, "from using said right of way of said Wabash, St. Louis & Pacific Railway Company" between the north line of the park and 18th street "including the tracks of said Wabash, St. Louis & Pacific Railway Company between" those lines and for general relief. A careful search of this bill has disclosed nothing which limits "said right of way" mentioned in the prayer to 28 or 30 feet in width but has brought to light a very clear indication that this right of way was wider and that its width was not indicated otherwise than by the ownership of the Wabash Company. The intervenors allege in this bill that on August 11, 1875, the St. Louis County Company had acquired a right of way 42 feet in width through the park and was the owner of a large part of such right of way east of the park, that it agreed on
782 that day to convey the joint use of its right of way through said park and a strip 30 feet wide off the south side of its right of way east of the park to the Kansas City Company, that by the tripartite agreement its right of way through the park 42 feet in width was assured to it on condition that it should permit other railroads to use its right of way through the park and up to the terminus of its road in St. Louis, that on December 24, 1878, the Kansas City Company became the owner of all the remainder of the County Company's right of way and property between the park and 18th street and that in 1879 the Wabash Company succeeded to the Kansas City Company and since that date "has used, enjoyed, owned and operated all the property formerly owned by said St. Louis, Kansas City & Northern Railway including the railroad and right of way from said Union avenue to Eighteenth street." These averments demonstrated that "said right of way" of the Wabash Company east of the park for the joint use of which the Colorado Company prayed was more than 30 feet in width, because they assert that the County Company owned parts of it in 1875, that it agreed to convey 30 feet in width off the south side of these parts on August 11th in that year, that the Kansas City Company acquired the remainder of them in 1878 and that the Wabash Company owned and operated all of them in 1886. The right of way east of the park described in the decree was not, therefore, limited to 30 feet in width by its reference to the amended bill or its prayer (1) because these contain no such limitation but describe a wider right of way and (2) because the subsequent terms of the decree which proceed to grant specifically the relief
783 prayed in the bill, which constitute the most cogent evidence of the intention of the court, contain no such limitation.

It is next said that the stipulation, testimony and opinions in the intervention limit the width of the right of way of the decree east of the park to 30 feet. In support of this contention attention is called to a stipulation in that proceeding to the effect that the propery conveyed by the deed of August 11, 1875, was marked in blue on the chart A and was 30 feet in width as a rule. But this admission fails to indicate that the right of way of the Wabash Company in 1886, parts of which had been derived from two other sources, was not wider, and the parties made other stipulations to the effect that the tracts marked "Grover" on chart A, which constituted the remainder of the isolated tracts of the County Company after it had conveyed the 28 and 30 feet strips, were subsequently obtained by the Kansas City Company and "that the several lots and tracts of land now constituting defendant's right of way between Forest Park and the Union Depot (many of which were more than 30 feet in width) not indicated in blue or marked "Grover" on chart A, were obtained by the St. Louis, Kansas City & Northern Railway Company from divers persons by purchase and condemnation," an admission inconsistent with the claim that the Wabash Company's right of way east of the park was only 30 feet wide. When these various stipulations are read together they fail to define or limit the width of the right of way east of the park or otherwise than by the ownership of the Wabash Company.

784 In the course of the proceedings in the intervention the value of the right of way and of the railway facilities thereon became an issue in determining the basis of the compensation to be paid by the Colorado Company for the use it sought. That company produced its chief engineer who testified that he had constructed the railroad of the Kansas City Company from the north line of the park to 18th street and that its right of way east of the park was 30 feet wide and it produced witnesses who testified that the value of this 30 feet strip without the improvements thereon was $265,000. On the other hand, the witnesses for the Wabash Company testified that the value of all the property of that company between the north line of the park and 18th street, including its tracks, side-tracks and other appurtenances necessary for doing the railway business, was from $1,250,000 to $1,500,000, and the master found the value to be $1,000,000. This appraisal was subsequently approved by the court.

Perhaps the most persuasive argument of counsel for the Wabash Company is that Emerson, the engineer of the Colorado Company testified that the right of way east of the park was 30 feet wide, that there were occasional places where there was a side track upon it and that there could be but one track

besides the main track upon this 30 feet, that the master found that the evidence of Emerson and of Lincoln (who was the engineer of the Wabash Company and who testified that the greatest width of the road bed through the park was 30 feet and that he did not know that he could state the width of the
785 right of way from the park to 18th street; that it was of irregular width at different places) showed that owing to the construction of the Wabash road and its side tracks and switches, another track could not be built on the right of way throughout the whole distance although it might be on some parts thereof and that as the Colorado Company could not construct another railroad over the entire length of this right of way, it was entitled to use the tracks and railway facilities of the Wabash Company thereon, and Judge Brewer when he was discussing in his opinion the contention of the Wabash Company that by the tripartite agreement the Wabash Company was required to permit other railroads to use its right of way only and was not bound to allow them to use its tracks or road-bed, said:

"The language of the ninth paragraph, under which as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its 'right of way'. Now the term 'right of way' has a two-fold signification; it sometimes is used to describe a right belonging to a party, a right of passage over any tract, and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed. Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the term 'right of way' and 'roadbed' frequently appear, and in all cases the term right of way is used as descriptive of the strip above referred to. * * * So the County Road conveyed to the Kansas Road outside
786 of the park, a strip either thirty or twenty-eight feet in width for its right of way. My thought, at first was that the intervenors could only claim a right to use so much of this right of way as was not in fact occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas Road's right of way as it did not itself occupy and use; but after reflection on the argument of counsel, I have been lead to the conviction that this was too narrow a construction, and was not the real intent of the parties. The master, in his report, shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track, and, as there is nothing to show that this occupation has not been made in good faith, and to supply the needs of the Wabash

company, if my first interpretation had been correct, the intervenors would plainly be without any rights."

If the learned judge had been considering or deciding the width of this right of way or had been endeavoring to give an accurate and comprehensive definition of the term "right of way", when he delivered this portion of his opinion, it might have indicated that he deemed the right of way east of the park 28 or 30 feet wide. But statements in the opinion of courts are authoritative upon the issue pending for decision and under consideration and upon that alone. Judge Brewer was distinguishing the right of way which consists in the right to travel over property from the right of way which consists of the strip of land acquired by a railway company for
787 its railroad tracks and facilities. He was not deciding whether a right of way of the latter class includes land taken by a railroad company which is necessary and convenient for railroad purposes including tracts for round houses turntables, turnouts and switches, or was limited to "that strip of land which railroad companies take upon which to construct their road-bed." If he had been determining this issue, there can be no doubt what his decision would have been. He was not determining what the width of the right of way of the Wabash company was, but whether or not the Colorado company was entitled to use the tracks and other railroad facilities upon that right of way. For this reason he did not attempt to set forth and did not accurately state the origin or extent of that right. His declaration that "the County Road conveyed to the Kansas Road outside of the park, a strip either thirty or twenty-eight feet in width for its right of way" was sufficient for the discussion of the issue he was then considering. But it was inaccurate and would have been misleading in the determination of the width of the Wabash company's right of way, because, as we have seen, the County Road conveyed only isolated strips of land which in the aggregate covered less than 50 per cent of its length and a still smaller percentage of its area. So his statement that the master's report showed "that the entire right of way is occupied by tracks and sidings so that there is no room for another and independent track" is a declaration not that the entire right of way was thus occupied, but as the master's report was, that
788 it was so occupied at some places that there was no room for another and independent track the entire length of it. This conclusion appears to have been as true of the entire strip as it was of the thirty feet, so that there is nothing in this statement in Judge Brewer's opinion or in the master's report or in the testimony upon which it is based to prove with any reasonable certainty that the decree which he

subsequently rendered and which on its face subject the entire strip and all the railway facilities thereon then owned by the Wabash Company to the joint use, did not express his deliberate conclusion, or that he intended to limit that use to a part of this strip 30 feet in width and the tracks thereon.

Counsel for the Wabash Company review the foregoing facts and insist that the Colorado company is estopped from claiming that the decree gives it the joint use of more than 30 feet in width east of the park (1) by its amended petition, but the Colorado company prayed in that petition for the use of a broader strip the width of which was undefined save by the limits of the strip then owned by the Wabash Company, (2) by the stipulation that the property conveyed by the deed of August 11, 1875, was 30 feet in width as a rule, but the parties made another stipulation that the tracts of varying width between the detached strips conveyed by that deed were also parts of the right of way of the Wabash company, (3) by the evidence of its witnesses that this right of way was only 30 feet wide and that its value, without the improvements there-
789 on, was only $265,000 and by the position of its counsel stated in an objection to evidence offered by the Wabash Company of the value of all its real estate between the north line of the park and 18th street and of the tracks and side tracks thereon and the other necessary appurtenances that the Colorado Company was not asking for the use of these tracks, side tracks or appurtenances, but for the use of the strip of 30 feet without them, only. But no estoppel arose here because the Wabash Company secured an overruling of the objection and a disregard of the testimony and obtained a decree upon the opposite theory. The record discloses no act or omision of the Colorado Company before the decree, which estopped it from claiming the full benefit of it.

It is strenuously contended, however, that counsel for that company conclusively estopped it from securing the use of more than 30 feet in width of the property of the Wabash company east of the park by the answer they made in their brief upon the appeal to the complaint of the Wabash company that the decree was too broad. That complaint was:

"The Court erred in [illegible]ering a decree broader than the contract.

"Even if the ninth clause of the tripartite agreement was binding on the Kansas City company, it only required it to permit other railroads to use its 'right of way,' and yet a decree was entered giving respondent the use of 'the right of
790 way, tracks, switches, turnouts, turntables and other terminal facilities of the Wabash company' at St. Louis.

"Again the decree is not only broader that the contract, but it is broader than the prayer of the petition. The prayer of the petition is, that the Colorado Company be permitted to use the right of way of the Wabash Company, 'commencing at the north line of said park, thence over said right of way to Eighteenth street in said city of St. Louis, by running its engines and cars over and upon said right of way, including the tracks of said Wabash Company between said points.'

"The contract only related to 'right of way'; the prayer of the petition was for the use of 'right of way and tracks', and the decree not only gives them the use of the 'right of way and tracks', but it is subject to the use of respondent the 'switches, side tracks, turnouts, turntables and other terminal facilities,' and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use.

"Therefore, no matter what view may be taken of the case in other respects, the decree was erroneous in two particulars: First, because it is broader than the covenant; and second, because it is broader than the prayer of the bill. Both of these objections are elementary."

And the counsel for the Colorado company answered it in these words:

"The contract permits other roads to use the tracks of
791 the County and Kansas City roads, and the decree gives the use of the tracks including turntables and other terminal facilities of the Wabash Company on its right of way. The record shows that the width of the right of way of appellants at Tayon avenue or Eighteenth street, being the terminus of the road at the Union Depot, is about forty feet. This is shown by chart A, in evidence. The side tracks, turnouts, etc., mentioned in the decree at the terminus are upon this forty feet, which is the right of way. Appellants have no depot of any kind, freight or passenger, to be used by any other road—the turntable, of course, is necessary for use of the tracks, as also the switching and sidings."

"Respondents under the decree, could only use what the evidence shows the appellants had, hence there is nothing in the contention that the decree is broader than the provisions of section 9, or the prayer of the bill."

"The record further shows that the Union Depot Company take charge of all trains, and have side track facilities for loading and unloading trains."

The most striking thing about these arguments is that counsel for the Wabash company nowhere claimed that the decree was too broad because it granted the joint use of all its right

of way east of the park upon the ground that the condition on which the decree was founded extended to a strip only 30 feet in width through it, but conceded that the grant of its entire right of way and tracks was admissible and ob-
792 jected only to the grant of the use of its switches, side tracks, turnouts, turntables and terminal facilities. Nor did it object to the grant of this use upon the ground that these were not upon its right of way or upon the 30 feet strip, but upon the sole ground that while the decree admissibly gave to the Colorado company the joint use of its right of way and tracks, the grant of the use of its "switches, side tracks, turnouts, turntables and other terminal facilities" was unwarranted. Nor do we find in the answer of the Colorado company any concession or statement that the width of the right of way of the decree was 30 feet. On the other hand, it contains the counter-assertion that it was about 40 feet in width at its eastern terminus and that the side tracks, turnouts &c. at this terminus were upon this forty feet. An assertion that a right of way is forty feet wide at one end cannot work as estoppel from insisting that it is more than 30 feet in width has been under consideration was overruled by the Supreme Court, the decree was affirmed, and thereby the question whether or not the decree was too broad became res adjudicata.

This court has not failed the facts that the public interest and the pecuniary interests involved in this litigation are important and permanent and that the effect of its decision may reach far into the future. All the reasons suggested by the court below and by the Wabash Company why the decree of 1886 should be limited to, or construed to mean a right of way 28 or 30 feet in width east of the park and the railway facilities thereon, only, have been thoughtfully and de-
793 liberately considered, and their main arguments have been discussed. They have failed to convince with any certainty that such is the true meaning of the decree or that such was the intention of the decree or that such was the intention of the judge who framed it or of the Supreme Court which affirmed it. On the other hand, the facts that the Colorado Company described, and prayed for the use of a wider strip in its amended bill, that the turntables described in the decree and some of the side tracks and turnouts were not upon the 30 feet strip, that the right of way at 18th street was stated to be 40 feet in width in the Supreme Court, that no claim was ever made by the Wabash Company during the litigation which resulted in the decree that the use of the Colorado Company should be limited to a tract of less width than the entire strip then owned by the Wabash Company, that this entire strip was necessary or convenient and was secured by the Wabash

Company for its tracks, side tracks and terminal facilities, that the ordinary significance of the term "right of way" under such circumstances is the entire strip procured for such purposes, and the plain and unlimited provisions of the decree that the Colorado Company shall enjoy the use "of said right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities" of the Wabash Company between the north line of the park and 18th street cogently persuade that the true meaning of the decree and the actual intention of the learned jurist who rendered it was to adjudge to the Colorado Company the use of the entire strip then owned by the Wabash Company and the railway facilities thereon. And
794 when to these considerations are added the fact that the partial defense that the condition of the tripartite agreement which was the foundation of the intervention attached to only 30 feet in width of the wider strip which the Wabash Company owned, was open to that company in that proceeding in both courts and was never presented and the indubitable rule of law that a second suit between the same parties or those in privity with them, upon the same claim or demand a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand (Cromwell v. County of Sac, 94 U. S. 351, 352; Dickson v. Wilkinson, 3 How. 57, 61; Dimock v. Copper Co., 117 U. S. 559, 565; Commissioners v. Platt 79 Fed. 567, 571, 572, 25 C. C. A. 87, 91, 92), there remains no legal or rational way of escape from that conclusion.

The evidence and arguments drawn from the acts and omissions of the parties since the decree of 1886, was rendered have been considered, but nothing has been discovered in them to avoid or modify this conclusion.

Finally, counsel contend that this is not a "hard and fast" decree, that the Colorado Company is applying to a court of equity to enforce it, that the court should not grant inequitable relief and that any broader relief than that given by the decree challenged by this appeal would be of this character.

A decree for the joint use of railway facilities may be fair and just when rendered and such radical changes may
795 subsequently be wrought that its continued enforcement would work great injustice. A court of equity always has the power and the judicial discretion to refuse to compel inequity and to condition the relief it grants with the requirement that he who seeks equity shall do equity. If such changes in the situation, rights or relations of these parties had occurred subsequent to the entry of this decree that its continued

enforcement would be unjust the courts would withhold their aid or condition it by new and equitable terms. But the original decree was conclusive of the rights and remedies of the parties at that time and thereafter until subsequent changes of conditions rendered some modification of the relief it granted just and equitable. It is to be interpreted and enforced in the light of the rules and principles of equity and of the opinions of courts upon which it was founded. For example, the use granted to the Colorado Company is the surplus use, that use which the business of the Wabash Company does not require, and as Judge Brewer said in the opinion upon which the decree is based, the time may come when that business will demand the entire use of the property and the Colorado Company's right to use it may entirely cease. Central Trust Co. v. Wabash, St. L. & P. R. Co., 29 Fed. 558. But there is no evidence in this case of any such requirement or of any change of conditions which now renders the original decree less just than when it was entered. Nor was it originally, nor is its enforcement now inequitable or unjust. Questions of this na-
796 ture have repeatedly received the consideration of this court and its views upon them have been approved by the Supreme Court. Union Pac. Ry. Co. v. Chicago, R. I. & Pac. Ry. Co., 2 C. C. A. 174, 232, 234, 51 Fed. 309, 318, 319, 321; Union Pac. Ry. Co. v. Chicago &c. Ry. Co., 163 U. S. 564, 585; Union Pac. Ry. Co. v. Mason City & Fort Dodge Ry. Co., 64 C. C. A. 348, 358, 128 Fed. 230, 240; Union Pacific Co. v. Mason City &c. Co., 199 U. S. 160, 171. In the case first cited we said:

"Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other" and we sustained and enforced a contract of the Union Pacific Company to grant the surplus or waste use of its bridge and terminal facilities at Omaha and South Omaha to the Rock Island Company. In the Mason City and Fort Dodge case this court enforced a similar use of the same property by another railroad company under acts of Congress, and said in answer to the argument that the latter company might build its own bridge: "The latter suggestion is unworthy of serious consideration. It is undoubtedly possible, but it is neither practicable nor advisable, either in the interest of the appellee or in the interest of the public whom it serves, that that company should invest the large amount of money that would be required to construct another bridge and to purchase a right of way
797 through the city of Omaha, and that it should consequently impose upon the traffic of the country the tax

that would be necessary to pay it a fair income upon such an investment."

It is undoubtedly possible for the Colorado Company to acquire the railway facilities in the city of St. Louis which it seeks under the decree of 1886 by purchase, condemnation and construction or by a more expensive contract with the Wabash or with some other company, but such a proceeding would burden the traffic of the country with the tax necessary to pay a fair income upon the investment of the increased expense of the new contract. The Wabash Company has the use of a right of way and of railway facilities in the city of St. Louis a part of which its business does not require. It obtained it subject to a condition imposed by the park commissioners for the benefit of the city and of the citizens of St. Louis that the Colorado Company should enjoy this surplus use on reasonable terms. Those terms have been determined and have been approved by the highest court in the land. No change of conditions since the decree of 1886 was rendered has been proved which makes its enforcement oppressive and it is just and equitable to it, to the public and to the Colorado Company that it should be enforced as it was rendered until some such change is wrought.

The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and 18th street which the Wabash owned or had acquired the right to use when the decree
798 of 1886 was rendered, and of the tracks, side tracks, turnouts, turntables and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company beyond the limits of that strip. Union Pac. R. Co. v. Mason City & Fort Dodge R. Co., 199 U. S. 171.

The question whether or not equity demands the decree in this case to be conditioned by the requirements that the Colorado Company shall henceforth pay in addition to the amount specified in the decree of 1886 six per cent. per annum upon one-half of the cost or value of the improvements which the Wabash Company has placed upon this right of way since 1886 or by any other requirement and questions pertinent to an accounting between the parties have not been considered, because there is no cross appeal and this decision does not foreclose the consideration and determination of these issues, if any, by the court below previous to the entry of its decree. Guarantee Co. v. Phenix Ins. Co., 59 C. C. A. 376 Fed. 170.

The decree below is reversed and the case is remanded to the Circuit Court with instructions to render a decree not inconsistent with the views expressed in this opinion.

Filed April 3, 1907.

Hook, Circuit Judge, specially concurring:

I concur in the reversal of the decree of the trial court and also for the most part in what is said in the foregoing opinion. I do not, however, concur in the exclusion of the industrial tracks from the operation of the decree of 1886. These tracks are the usual and necessary features of railway terminals in a large city and are as much a part thereof as the limbs
799 are of a tree. They go with the right of way as appendages thereto and are always so regarded. Their use is essential to the enjoyment of the rights awarded. In my opinion they are clearly within the spirit of the decree of 1886 and also by fair construction within its letter. The decree granted to the intervenor the "right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth street in the city of St. Louis." This is very broad language and it was repeatedly employed in the decree. That Judge Brewer intended to include such industrial tracks as were in existence when the decree was made also seems plain from his opinion (29 Fed. 559). The cost of their construction was included in the total cost upon which the percentage compensation to be paid by the intervenor was based. Moreover, the consistent course of conduct of the parties for thirteen years following the decree shows that they regarded them as being a part of the property the joint use of which was granted to the intervenor. I am unable to see any persuasive reason for excepting them from the comprehensive enumeration of terminal facilities in the decree. That they extend beyond the side lines of the strip of land owned by the Wabash Company and upon the land of others seems to me to be a circumstance wholly immaterial, and yet it must be the circumstance upon which their exclusion from the decree is made to depend. The Wabash Company owns these industrial tracks and operates them as part of its right of way and terminal facilities. Of what importance is it that they are in part upon public highways and the land of others under license instead of being wholly upon land owned by that company? If the latter condition existed it would doubtless be conceded that they fell within the decree. The scope of the decree is therefore determined not by the character
800 of the tracks and their relation to the right of way and terminal facilities as a whole with which the court was dealing, but by the character of the title of the Wabash Com-

pany to the ground upon which the tracks are laid. It seems to me there has been a narrowing of the decree in this particular.

The case of Union Pacific Company v. Mason City Company, 199 U. S. 160, 171, is not an authority for this construction of the decree. The court was there considering a claim of the Mason City Company for the use of the Union Pacific bridge across the Missouri River at Omaha, and its approaches. Naturally this would not include industrial tracks and switches. Indeed, when rightly regarded, the decision of the Supreme Court makes for a conclusion contrary to that reached by my associates. An act of Congress conferring in most general terms upon other railroad companies the right to cross the bridge at Omaha was held to give the Mason City Company the right not only to cross the bridge but to use several miles of main and passing tracks of the Union Pacific in the cities of Omaha and South Omaha. The decision well serves to illustrate the liberality with which provisions of the kind we are now discussing are construed when public interests are involved.

Of course the right to use industrial tracks laid since the decree of 1886 was rendered would require consideration of the subject of compensation. The compensation specified in the decree does not include them.

There are also some other observations near the close of the foregoing opinion which I think are not necessary to the consideration of the case. They relate to conditions which
801 it is conceded do not exist at present and which may never arise in the future. I do not wish to express or concur in any view concerning them until they arise and are presented for judgment in the usual way.

Filed April 3, 1907.

"Exhibit 2".

United States of America—ss.

The President of the United States of America, To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Missouri—Greeting:

(Seal)

Whereas, lately in the Circuit Court of the United States for the Eastern District of Missouri, before you, or some of you, in a cause between the Central Trust Company of New York, et al., complainants, and the Wabash, St. Louis and Pacific Railway Company, et al., defendants, and wherein the St. Louis, Kansas City and Colorado Railroad Company filed its

intervening petition against the Wabash Railroad Company et al., and wherein the decree of the said Circuit Court in said cause, entered on the 2nd day of April A. D. 1906, is in the following words, viz:

802 "This cause came on for final hearing this 2nd day of April, 1906, upon the motion and application of the St. Louis, Kansas City and Colorado Railroad Company. The parties appeared by counsel. The intervenor appeared by M. A. Low, W. F. Evans and Frank Hagerman, its solicitors; and the Wabash Railroad Company appeared by Wells H Blodgett, H. S. Priest, C. N. Travous and J. L. Minnis, its solicitors. The cause was submitted upon the bound volume of testimony in this cause, entitled and designated 'Pleadings and Evidence', and two plats marked 'Chart A' and 'Exhibit D' respectively; and the court having heard the arguments of counsel, and being fully advised in the premises orders, adjudges and decrees:

The decree of December 31, 1886, set out in the intervenor's application and motion is in full force and effect, and is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant, Wabash Railroad Company, its successors and assigns, and the said Wabash Railroad Company, its officers, agents, and employes, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, and subject to the regulations therein set forth, the equal right to use, with the engines and cars (loaded or empty) of the latter, the right-of-way, tracks switches, side-tracks, turnouts, turn-tables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street.

And it is further, adjudged and decreed that the words 'tracks, switches, side-tracks, [switches, side-tracks,] turnouts,
803 turntables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth street', and hereinbefore used and as used in the original decree in this case, correctly interpreted and understood, mean only such tracks, switches, side-tracks, turnouts, turntables, and Terminal facilities as are or may be situated and located upon the strip of land 42 feet wide, commencing at the north line of Forest Park where the railway of the Wabash Railroad Company enters said Park; thence along said strip, or right of way, on which the said railway is located, through said park, and thence, over a strip of land 28 or 30 feet wide on which is located the said railway, to said Eighteenth street, in the city of St. Louis, it

being a continuous strip from the north line of Forest Park to said Eighteenth Street, and does not embrace any tracks of any kind not situate on said strip of land just described; and said Wabash Railroad Company, its officers, agents and employes are enjoined from refusing to permit such use, under the terms of said decree, and subject to the regulations therein set forth, by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, the right to the use by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, which the said Wabash Railroad Company is enjoined to forthwith accord, and is enjoined from refusing, is not limited to the ingress and egress of said St. Louis, Kansas City & Colorado Railroad Company, with its trains, engines, and cars to and from the north line of Forest Park to Eighteenth Street in St. Louis, Missouri, but
804 does include in all respects, subject to the terms of said decree, as hereinbefore interpreted, and subject to the regulations therein set forth, the right to the equal use and benefits, with its engines, cars and trains, of all the right-of-way, tracks, switches, side-tracks, turnouts, turn-tables and other terminal facilities which are or may be situate as hereinbefore defined, and the right to so use the said terminal facilities between the points aforesaid for all purposes that they are now used, or are susceptible of being used by the said Wabash Railroad Company, under the said regulations provided for in said original decree.

It is further ordered, adjudged and decreed that the St. Louis, Kansas City & Colorado Railroad Company and the Wabash Railroad Company each pay its own costs and expenses in this proceeding, to be herein taxed, and that execution issue therefor.

No appeal shall supersede the injunctive portion of this decree.

JOHN H. ROGERS,
U. S. District Judge.

St. Louis, Mo., April 2nd, 1906."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit, by virtue of an appeal agreeably to the act of Congress, in such case made and provided fully and at large appears, and Whereas, in the present term of December, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said United States Circuit Court of Appeals on the transcript of record from said Circuit Court, and was
805 argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said

Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and the [the] St. Louis, Kansas City and Colorado Railroad Company have and recover against the Wabash Railroad Company, the sum of Three Hundred and Eighty Two and 90/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to enter a decree not inconsistent with the views expressed in the opinion of this Court.

April 3, 1907.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had the said appeal notwithstanding.

Witness, the Honorable, Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Third day of June in the year of our Lord one thousand nine hundred and seven.

Costs of Appellant:

Clerk	$ 27.15
Printing record	335.75
Attorney	20.00
	$382.90

806 (Sgd.) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

And afterwards to-wit: on the 20th day of December A. D. 1907 the following among other proceedings were had and appear of record in said cause, to-wit:

(Final Decree.)

807 In the Circuit Court of the United States for the Eastern District of Missouri.

Central Trust Company, et al., Complainants,
Nos. 2357 and 2464 vs. In Equity.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated.

In the Matter of the Intervening Petition of the City of St. Louis and St. Louis, Kansas City and Colorado Railroad Company.

This cause came on for final hearing this 20th day of December, 1907, upon the motion and application of the St. Louis, Kansas City & Colorado Railroad Company and the mandate of the Circuit Court of Appeals for the Eighth Judicial Circuit. The parties appeared by their respective counsel, the Intervenor appearing by M. A. Low, W. F. Evans and Frank Hagerman, its Solicitors; and the Wabash Railroad Company by H. S. Priest, J. L. Minnis and Wells H. Blodgett, its Solicitors.

The cause was submitted upon the bound volume of testimony in this case, entitled and designated, "Pleadings and Evidence," two plats marked "Chart A" and "Exhibit D," respectively, and the Amendment to Petition of the St. Louis, Kansas City &
808 Colorado Railroad Company, and upon the mandate and opinion of the Circuit Court of Appeals.

The Court, having heard the arguments of counsel and being fully advised in the premises, orders, adjudged and decrees:

I.

The decree of December 31st, 1886 set out in the intervenor's application and motion, is in full force and effect, and is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant Wabash Railroad Company, its successors and assigns. The said Wabash Railroad Company, it officers, agents and employés, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, the enjoyment of the joint and equal use of the entire strip of land between the east line of Forest Park and Eighteenth Street in St. Louis, Missouri, which the predecessor of the Wabash Railroad Company owned or had acquired the right to use when the said decree of December 31, 1886, was rendered, and of the tracks side-tracks, turn-outs, turntables and terminal facilities now thereon, but is not entitled to the use under that decree of any of the property industrial, or railway facilities of the Wabash Railroad Company beyond the limits of that strip and said Wabash Railroad Company, its officers, agents and employés are enjoined from refusing to permit such use under the terms of said decree by said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns.

II.

It is further ordered, adjudged and decreed, that each party
809 pay one half of the costs and expenses including printing in this court, to be herein taxed, and that execution issue therefor.

No appeal shall supersede the injunctive portion of this decree.

JOHN H. ROGERS, *Judge.*

Dec. 20, 1907.

806 And thereupon to-wit: on said 20th day of December, A. D. 1907, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Order Allowing Appeal to Supreme Court.)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

2357 and 2464.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants; ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY, Intervenor.

Order Allowing Appeal.

Now at this day comes said intervenor by its solicitors and files and presents to the Court its Assignment of Errors, Petition for an Appeal from the final decree this day entered herein to the Supreme Court of the United States at the City of Washington, D. C., and appeal bond in Five Thousand Dollars, conditioned as required by law; upon due consideration whereof it is ordered that said
807 appeal be and the same is hereby granted as prayed, and said bond approved; and that the Clerk of this Court make and certify to said Supreme Court of the United States at the City of Washington, D. C., a full true and complete transcript of the record, and proceedings as fully as the same remain on file and of record in this cause in his office; and now a Citation citing and admonishing the Wabash Railroad Company and the City of St. Louis, Missouri, to be and appear in said Supreme Court within thirty days from and after this date is signed by the Judge and filed.

JOHN H. ROGERS,
U. S. Dist. Judge for the West'n Dis't of Kansas, Assigned to and Sitting in the Circuit Court of the United States for the East'n Div. of the East'n Dist. of Missouri.

December 20th, 1907.

808 Which said Assignment of Errors, Petition for Appeal and Bond are respectively in words and figures as follows, to-wit:

(Assignment of Errors, Supreme Court.)

In the Circuit Court of the United States for the Eastern Division, Eastern District of Missouri, Eighth Judicial Circuit.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

In the Matter of the Intervening Petition of the City of St. Louis and The St. Louis, Kansas City and Colorado Railroad Company, Filed Herein July 12th, 1886.

Application and Motion of The St. Louis, Kansas City and Colorado Railroad Company.

Assignment of Errors.

Now comes the St. Louis, Kansas City and Colorado Railroad Company, and presents this assignment of errors as part of its
809 application for an appeal, and respectfully shows that the Court aforesaid, in the above entitled cause, upon said motion and application, erred in each of the following rulings:—

1. In rendering the decree of December 20th, 1907, for that the same was contrary to the law and contrary to the evidence in the case.

2. In rendering and entering that portion of said decree providing, "But it is not entitled to the use, under that decree of any of the property, industrial or railway facilities of the Wabash Railroad Company, beyond the limits of that strip."

3. In rendering and entering the said decree and particularly each portion thereof herein complained of, the Court failed to give full faith and credit to the decree of December 31st, 1886, and its affirmance to which appellant was entitled, under and by virtue of the following provisions of the constitution of the United States:—

Section 8, Article I: Section- 1 and 2 of Article III; Section 1 of Article V and Article VI.

W. F. EVANS,
FRANK HAGERMAN,
For Appellants.

810 (*Petition for Appeal, Supreme Court.*)

In the Circuit Court of the United States for the Eastern Division of Eastern District of Missouri, Eighth Judicial Circuit.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,

vs.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

In the Matter of the Intervening Petition of the City of St. Louis and The St. Louis, Kansas City and Colorado Railroad Company, Filed Herein July 12th, 1886.

Application and Motion of The St. Louis, Kansas City and Colorado Railroad Company.

Application of the St. Louis, Kansas City and Colorado Railroad Company for an Appeal.

811 Now comes the St. Louis, Kansas City & Colorado Railroad Company and respectfully shows that upon December 20th, 1907, there was entered in the above entitled cause upon the said application and motion, a decree, from which said Company desires to and does hereby appeal.

There is attached hereto and made a part hereof an assignment of errors, and there is presented herewith a proper bond.

Wherefore, said Company asks that an appeal be allowed to the Supreme Court of the United States and for reversal of said decree.

W. F. EVANS,
FRANK HAGERMAN,
Solicitors for St. Louis, Kansas City & Colorado Railroad Company.

Allowed this December 20th, 1907.

JOHN H. ROGERS, *Judge.*

812 (*Bond on Appeal, Supreme Court.*)

In the Circuit Court of the United States for the Eastern Division of Eastern District of Missouri, Eighth Judicial Circuit.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

In the Matter of the Intervening Petition of the City of St. Louis and The St. Louis, Kansas City and Colorado Railroad Company, Filed Herein July 12, 1886.

Application and Motion of The St. Louis, Kansas City and Colorado Railroad Company.

Bond.

813 UNITED STATES OF AMERICA, *sct:*

Know all men by these presents That we, St. Louis, Kansas City and Colorado Railroad Company and A. J. Davidson are held and firmly bound unto Wabash Railroad Company, and any other party interested, in the full and just sum of five thousand Dollars, ($5,000), to be paid to said Wabash Railroad Company, its successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this 20th day of December, A. D. 1907.

Whereas in the above entitled cause, upon the said application and motion, a decree was rendered against the said St. Louis, Kansas City and Colorado Railroad Company, which has obtained an appeal to reverse the said decree and a citation directed to the said Wabash Railroad Company, citing and admonishing it to be and appear in the United States Supreme Court, at the city of Washington, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said St. Louis, Kansas City and Colorado Railroad Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY,

814 By W. F. EVANS, *Its Solicitors.* [SEAL.]
A. J. DAVIDSON. [SEAL.]
——— ———. [SEAL.]

The above bond is hereby approved this December 20, 1907, and ordered to be filed and made a part of the record.

JOHN H. ROGERS, *Judge.*

815 And afterwards to-wit: on the 14th day of January, A. I
1908, there was filed in said cause a Præcipe for Transcrip
which said præcipe is in words and figures as follows, to-wit:

(*Præcipe for Transcript.*)

In the Circuit Court of the United States for the Eastern Divisio
of the Eastern Judicial District of Missouri.

2357 & 2464.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainant
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defen
ants; ST. LOUIS, KANSAS CITY & COLADO RAILROAD COMPAN
Intervenor.

Præcipe for Transcript.

To James R. Gray, Clerk of said Circuit Court:

SIR: In preparing transcript on appeal of the above-entitled cau
to the United States Supreme Court you are hereby requested
include therein none but the following records, pleadings and proo
to-wit:

(1) Volume entitled "Pleadings and Evidence;"
(2) Mandate of U. S. Court of Appeals, Eight- Circuit.
(3) Order allowing Amendment of Intervening Petition and sa
Amendment:
(4) Final decree entered December 20th, 1907:
(5) Order allowing appeal to said Supreme Court;
816 (6) Assignment of Errors on said appeal;
(7) Petition for said appeal;
(8) Bond on said appeal;
(9) Certificate of Clerk.

W. F. EVANS AND
FRANK HAGERMAN,
Sol'r- for said Intervenor.

(*Clerk's Certificate.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

In the Circuit Court of the United States in and for the Divisio
and District Aforesaid.

I, James R. Gray, Clerk of the Circuit Court of the United Stat
in and for the Eastern Division of the Eastern Judicial District
Missouri, do hereby certify that the above and foregoing is a ful

true and complete transcript of the record and proceedings in the cause therein entitled, as called for, and as restricted by the præcipe for transcript hereinbefore set forth, together with all things of and concerning the same, as fully as the same remain on file and of record in said cause in my office: and that the original Citation is hereto attached and herewith returned.

In witness whereof, I hereunto set my hand and affix the seal of said Court at office in the City of St. Louis this 15″ day of January, A. D. 1908.

[Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.]

JAMES R. GRAY,
Clerk of said Court.

Endorsed on cover: File No. 20,980. E. Missouri C. C. U. S. Term No. 577. St. Louis, Kansas City & Colorado Railroad Company, appellant, *vs.* The City of St. Louis and Wabash Railroad Company. Filed January 17th, 1908. File No. 20,980.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 57.

ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY, APPELLANT,

vs.

WABASH RAILROAD COMPANY AND CITY OF ST. LOUIS, APPELLEES.

SUPPLEMENTAL BRIEF OF WABASH RAILROAD COMPANY.

On reflection we concluded the questions propounded by members of the court on the oral argument deserved more deliberate consideration than we were then able to give them, and accordingly asked and obtained leave to file a supplemental brief covering the points thus called to our attention, which we herewith submit.

In accordance with the request of Mr. Justice Day, we have, at the conclusion of this brief, made reference to the testimony in the transcript which we claim shows that the Colorado Company did not pay a share of the costs of the construction of the industrial tracks, and that its cars were handled by Wabash engines on the industrial tracks under

an agreement between the operating officials of the two companies, entirely aside and separate from the decree, and that the contributions of the Colorado Company toward the maintenance of those tracks were made under such agreement.

I.

Reply to the inquiry made by the Court with respect to the decisions in Loeb v. Columbia Township, Trustee, 179 U. S. 472, and MacFadden v. U. S., 213 U. S., 288, and other similar cases.

1. These cases hold, that this court, may review on writ of error or appeal, a judgment or decree of a circuit court in a case wherein the jurisdiction of the circuit court has been invoked on the ground of diverse citizenship of the parties, provided a constitutional question is properly presented by the record.

This ruling, however, has no bearing on the case at bar, because the case at bar is an intervention suit, in the case of the Central Trust Company *et al. v.* Wabash, St. Louis and Pacific Railway Company, Nos. 2357 and 2464 (page 3, transcript).

It is conceded by learned counsel for the Colorado Company (page 9 of his brief in support of the petition for certiorari) that the jurisdiction of the circuit court in the latter or main case was invoked on the ground of diverse citizenship of the parties thereto. The record shows that the main case was a suit to foreclose a mortgage, and it is not contended that any constitutional question arose in that case.

The court, has often held, that for the purposes of an appeal or writ of error, the ground of jurisdiction in an intervention suit, will be ascribed to that of the main case.

Rouse *v.* Letcher, 156 U. S., 47.

Learned counsel for the Colorado Company concede this legal proposition on page nine of their brief in support of the petition for certiorari, where the following cases will be found cited in support. Gregory *v.* Van Ee, 160 U. S., 643; Carey *v.* R. Co., 161 U. S., 115; Rouse *v.* Hornsby, 161 U. S., 588; Pope *v.* L. & N. R. Co., 173 U. S., 573.

In the cases above cited constitutional questions were presented by the intervening petitions or arose in the progress of the intervention suits, but it was held that as the jurisdiction in the main cases rested on the diverse citizenship of the parties, appeals or writs of error would not lie to this court from decrees or judgments rendered in the intervention suits. These decisions, then, afford grounds for affirming that this court has not jurisdiction to review on appeal the decree entered by the circuit court in accordance with the mandate, even if it were conceded that an appeal would lie from that decree and that constitutional questions were properly and timely presented.

2. The Loeb, McCracken, and other similar cases, further hold that the defeated party may at his election appeal either to this court or the Circuit Court of Appeals from a decree entered in the circuit court in a cause between citizens of different States wherein constitutional questions are involved, but if he prosecutes his appeal to the Circuit Court of Appeals the decree of that court will be final and he cannot thereafter prosecute an appeal to this court.

If the Circuit Court of Appeals by its decision in the appeal prosecuted by the Colorado Company there, failed to give full faith and credit to the decree of December 31, 1886, it necessarily follows that the circuit court by entering the decree from which that appeal was prosecuted, failed to give full faith and credit to the decree of December 31, 1886, because the decree of the circuit court gave the Colorado Company *less* than the Circuit Court of Appeals gave it. If, then, the reasoning by which learned counsel endeavor to

support the contention that a constitutional question exists in the case be sound, the Colorado Company was entitled to appeal from the first decree rendered by the circuit court either to this court or to the Circuit Court of Apepals. It elected to take its appeal to the Circuit Court of Appeals, where it prevailed. The decree of reversal was in favor of and in response to the prayer and insistence of the Colorado Company, and it was suffered to become final.

If it were conceded that a constitutional question did not arise until the decision of the Circuit Court of Appeals, the Colorado Company then might have applied to this court for a writ of certiorari, which this court might have in its discretion allowed at that stage of the proceedings. Forsyth *v.* Hammond, 166 U. S., 506; Harriman *v.* Northern Securities Company, 197 U. S., 244. But the Colorado Company chose to avail itself of the favorable decision of the Circuit Court of Appeals, which is embodied in the decree entered pursuant to the mandate, and from *this vantage point* thus gained by the decision of the Circuit Court of Appeals it endeavors to prosecute an appeal in this court and another appeal in the Circuit Court of Appeals. It then not only *elected* to prosecute an appeal to the Circuit Court of Appeals from the first decree, but it *has availed itself of the favorable decision of that court.*

Besides, as the Colorado Company was the prevailing party on appeal to the Circuit Court of Appeals, the decree entered pursuant to the mandate was in a legal sense entered upon its motion. The Wabash Company was not interested in having that decree entered, and is in no sense responsible for it. The Colorado Company must be regarded as the moving party in placing itself in a position to enjoy the fruits of its appeal to the Circuit Court of Appeals. The decree entered pursuant to the mandate is final and conclusive on the Wabash Company. It could not have appealed from that decree, notwithstanding the decree was against it and in favor of the Colorado Company. On what ground

then, can the Colorado Company base its claim that it was not also bound by the decree.

We can conceive of no legal principle which would afford a basis for the present contention of the Colorado Company that it has the right to hold on to what it obtained by the favorable decision of the Circuit Court of Appeals, as embodied in the decree entered pursuant to the mandate, and at the same time prosecute therefrom an appeal to this court or a further appeal to the Circuit Court of Appeals. Certainly the decisions of this court do not afford a basis for such a contention.

II.

Reply to the inquiry with respect to the power of the Circuit Court under the mandate.

The Circuit Court of Appeals (Transcript, 601, l. c. 619; 152 Fed. Rep., 849, l. c. 863) decided the entire case or claim of the Colorado Company, but left the Circuit Court at liberty to entertain an application of the Wabash Company for a readjustment of the rental the Colorado Company was obligated to pay for the use of the property.

On the oral argument we were asked whether the circumstance that the Wabash Company was not foreclosed by the decision of the Circuit Court of Appeals from applying for a readjustment of the rental did not distinguish the case at bar from the case of Stewart *v.* Salamon, 97 U. S., 361, and similar cases, which hold that an appeal cannot be prosecuted from a decree entered in exact conformity with a mandate of an appellate court. The point suggested is whether the reservation in the opinion of the Circuit Court of Appeals to the Wabash Company of the right to apply for a readjustment of the rental, left judicial power or discretion in the Circuit Court with respect to the decree it should enter. It is conceded that the Wabash Company did not exercise

any right reserved to it or present any question for decision on the coming down of the mandate.

The uniform decisions of this court afford a conclusive answer to the question. In the case of U. S. *v.* New York Indians, 173 U. S., 464, an appeal was sought to be prosecuted from a decree of the Court of Claims entered in obedience to a mandate of this court. The mandate of this court (l. c. 466) remanded the case to the Court of Claims with instructions which required of the Court of Claims the exercise of its discretion and judicial power on many questions, and authorized that court, among other things, to make "such deductions as may seem to the court below to be just and for such other proceedings as may be necessary and in conformity with this opinion." The Court of Claims, acting under the mandate, proceeded with the cause to judgment. The United States prosecuted a second appeal to this court. The court, after ascertaining that the Court of Claims had acted in accordance with the mandate, said:

> "This court has repeatedly held that a second writ of error does not bring up the whole record for reexamination, but only the proceedings subsequent to the mandate, and if these proceedings are merely such as the mandate command and are necessary to its execution, the writ of error will be dismissed, as any other rule would enable the losing party to delay the issuing of the mandate indefinitely. The Santa Maria, 10 Wheat., 431; Roberts *v.* Cooper, 20 How., 467; Tyler *v.* Magwire, 17 Wall., 253; The Lady Pike, 96 U. S., 461; Supervisors *v.* Kennicott, 94 U. S., 498; Stewart *v.* Salamon, 97 U. S., 361. In Stewart *v.* Salamon, *supra*, Mr. Chief Justice Waite observed:
>
> 'An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee,

> examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. The same rule applies to writs of error. This is not intended to interfere with any remedy the parties may have by mandamus.' Humphrey *v.* Baker, 103 U. S., 736; Clark *v.* Keith, 103 U. S., 464; Mackall *v.* Richards, 116 U. S., 45. The appeal will therefore be dismissed."

In the case of Illinois *v.* Illinois Central Railroad Company, 184 U. S., 77, Mr. Justice Harlan in delivering the opinion of the court cites an unbroken line of decisions of this court (l. c., 91), beginning with the earliest cases, and among them Sibbald *v.* U. S., 12 Pet., 488, from which the following is quoted with approval:

> "Whatever was before the court and is disposed of is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief or review it upon any matter decided upon appeal for error apparent; or intermeddle with it *further than to settle so much as has been remanded.* After a mandate no rehearing will be granted and on a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate."

Mr. Justice Harlan quotes approvingly the following from Roberts *v.* Cooper, 20 How., 467:

> "It has been settled by the decisions of this court that after a case has been brought here and decided and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of these questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to

> endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on its opinions, or speculate on chances from changes in its members. We can now notice therefore only such errors as are alleged to have occurred in the decisions on questions which were peculiar to the second trial."

Following this quotation, Mr. Justice Harlan in a footnote cites, in addition to the cases mentioned in the opinion, seventeen cases, beginning with the case of Martin *v.* Hunter's Lessee, 1 Wheat., 304, and ending with the case of New Orleans *v.* Citizens' Bank, 167 U. S., 371, and then says, with respect to the case then before the court (l. c., 93): "We therefore do not stop to consider, as the appellant insists we should do, whether this court erred in any particular in its opinion or judgment on the former appeal in respect of any matter then determined. Every matter embraced by the original decree of the Circuit Court and not left open by the decree of this court was conclusively determined, as between the parties, by our former decree, and is not subject to reexamination on this appeal."

It is conceded in the case at bar that the Circuit Court of Appeals decided all questions in the case in relation to the Colorado Company's claim and that the Circuit Court entered a decree in exact conformity with the mandate. As, then, there were no proceedings subsequent to the mandate, the decree of the Circuit Court is not reviewable. To say that an appeal may be prosecuted which does not present any question for review or decision involves a contradiction. We therefore submit that the orders allowing the appeal to this court and the Circuit Court of Appeals in the case at bar were void.

III.

The only question presented by this record is whether the Circuit Court committed error in entering a decree in accordance with the mandate, and this question may not appropriately be reviewed.

The Circuit Court performed no act except to enter the decree in accordance with the mandate, and that act is the only one complained of in appellant's assignment of errors (p. 32, appellant's brief, filed November 18, 1909). The appellant, on the coming down of the mandate, contended by what is designated as its amended petition (p. 597 *et seq.*, transcript) that the Circuit Court should disregard the mandate and accord appellant "the right under said decree to the equal use and benefit of the property, industrial and railroad facilities *from which said opinion of the Circuit Court of Appeals attempts to exclude it.*"

The question, then, is whether the Circuit Court committed error in refusing to reverse the decision of the Circuit Court of Appeals and in entering the decree in exact accordance with the mandate.

If the appeal is sustained, the decision of this court cannot proceed beyond answering that question, because that is the only question on which the Colorado Company asks a decision. The appeal challenges only the act of the Circuit Court in entering the decree in exact accordance with the mandate.

The Circuit Court had no discretion, but acted as a ministerial agent of the Circuit Court of Appeals. The decree did not represent the judgment or discretion of the Circuit Court, because the decree of that court was reversed. The Circuit Court in entering the decree according to the mandate did no more than it could have been compelled to do by mandamus.

We submit that the action of the Circuit Court in execution of the mandate does not present a question for review.

But the decree the Circuit Court entered was, as said in Stewart *v.* Salamon, in effect the decree of the Circuit Court of Appeals, and learned counsel in their oral argument and briefs complain only of the action of that court. May then the appeals allowed from the decree of the Circuit Court be considered as appeals from a decree of the Circuit Court of Appeals? This question was answered in the negative in the case of Webster *v.* Daly, 163 U. S., 155.

IV.

Our reason for not filing brief on the so-called merits.

On the oral argument our attention was called to our failure to file a brief on the merits, and we stated we would submit our case on our brief in support of the motion to dismiss and in opposition to the petition for a writ of certiorari, because the record failed to present "merits," or in other words, any question for review.

In an ordinary case set down for hearing on a motion to dismiss and on the merits, counsel, no doubt, could not with due deference to the court, or the interests of his client, prejudge the decision of the court by submitting his cause on the motion to dismiss alone. To dispel a possible erroneous impression with respect to the propriety of counsel for the appellee resting their case on their brief in support of the motion to dismiss and in opposition to the petition for writ of certiorari, we wish here to call attention to the posture of the litigation at bar, with a view of showing that we were obliged from the necessities of the case to pursue that course and could not with propriety have pursued any other.

What question could we have presented or discussed in a brief on the merits? We have seen that the appeal challenges the action of the Circuit Court in entering the decree appealed from in accordance with the mandate of the Circuit

Court of Appeals. If the propriety of the action of the Circuit Court in entering that decree constitutes the merits of the case, then we have covered the merits in our brief on file, wherein we have endeavored to show that the action of the Circuit Court was not only free from error but was in compliance with an order it was in duty bound to execute.

May it be said that we could have briefed the questions decided by the Circuit Court of Appeals? It should be borne in mind that the decision of the Circuit Court of Appeals was adverse to us. At the end of a long drawn out litigation that court decided against our contentions. When the opinion was handed down, we examined the decisions of this court with a view of applying for a writ of certiorari in order to have the case reviewed here, but we concluded, as learned counsel for the Colorado Company seems to have concluded (p. 9, brief in support of petition for certiorari), that in view of the circumstance that the controversy was between private parties and involved private rights, and the policy of the court as announced in the case of C. and N. W. R. Co. *v.* Osborne, 146 U. S., 354, and other similar cases, we could not hope to succeed. If the case had been removed from the Circuit Court of Appeals to this court, then we could have urged here our contentions made in that court. The decision of that court, however, was suffered to become final. It is obvious, then, we could not now present to this court for review our contentions which passed into judgment in that case, and as that judgment was against us we think it equally obvious we ought not to be asked to defend it.

As we were concluded by that judgment from renewing our contentions made in the Circuit Court of Appeals, the Colorado Company must have been concluded thereby from renewing its contentions.

In view of the many decisions of this Court directly in point, we submit we could not with due deference to the court, have proceeded on the assumption that the decree of the Circuit Court of Appeals did not conclude the litigation.

V.

What the record shows with respect to the claim that the Colorado Company paid "its share" of the cost of the construction of the industrial tracks.

In complying with the request of Mr. Justice Day, we will subdivide the matter and will first consider what the record shows with respect to the Colorado Company having paid "its share" of the cost of the construction of the industrial tracks.

On the oral argument learned counsel for the Colorado Company was repeatedly asked the direct question whether the record showed that the Colorado Company paid its share of the cost of the industrial tracks. Learned counsel replied to these questions specifically by affirming that the record showed that the Colorado Company paid its share of the cost of these tracks. While we did not wish to discuss the contentions decided by the Circuit Court of Appeals, we did not think the answers of learned counsel justified the imputation they naturally carried, and as they were unsupported by the record we challenged their accuracy.

Learned counsel in their brief, filed November 18, 1909, page 16, state that the Colorado Company paid "its proportion of all the repairs and of all the maintenance of all such property, including the yards and other property (Rec., 26, partial agreed statement, par. 12; evidence Pryor, Rec., 508, 509, 510, 511; petition in Luke case, Rec., 440, 475), and whenever anything was paid by the Wabash Company upon account of any industrial track between 18th street and the park, *no matter where located or with what part of the right of way it was connected,* the Colorado Company was charged with, and paid under the decree, its proportion of the amount paid on account thereof by the Wabash Company (Second agreed statement, Rec., 347, 360; depositions Tay-

lor, Rec., 320-26; Haynes, 328-33; Hines, 333-36; Decker, 336-38).

The stipulations mentioned do not refer to the industrial tracks, as learned counsel concede on page 115 of their brief in the following words: "As to all the property except tracks leading to private industries, as to which the matter was left open to proof, the parties stipulated, etc." In the following paragraph on the same page they state: "As to the industrial tracks, *i. e.*, the tracks leading to private industries, the parties failed to agree (Rec., 26, 27, par. 12-14). These industrial tracks were (Rec., 27, par. 14) constructed under a form of contract (Rec., 313), by which the industry paid in full for the cost of everything except rails, switches, frogs, bolts, and splices, and as to those the industry paid in the form of six per cent interest upon the cost."

On page 313 of the transcript will be found a sample agreement, under which the industrial tracks were constructed. This agreement was made between the Wabash Railroad Company and the Berry Horn Coal Company. A perusal of the agreement will show that the Wabash Company furnished the materials for the construction of the industrial tracks and charged the industry 6 per cent interest on the cost thereof and that the industry agreed to pay for the repair and maintenance of the tracks. This instrument enables us to definitely say that the Wabash Company furnished the material for the industrial tracks and that the industries obligated themselves to pay the cost of repairs and maintenance. This matter would seem to dispose of the contention that the Colorado Company paid its share of the cost of the industrial tracks, because by the agreement the industry pays 6 per cent on the value of the materials furnished by the Wabash Company, which makes the Wabash Company whole, so in effect neither of the railway companies were burdened with the cost of the industrial tracks.

We will now refer to the pages of the record referred to in the first excerpt above quoted from appellant's brief to determine what the witnesses testified to. The first reference is to the evidence of Pryor (p. 508 *et seq.* of the record). Mr. Pryor's testimony begins on page 507, where he states that he was in charge of the accounts of the Wabash Company and was familiar with the accounts and all matters in connection with the accounts between the two companies. He further testified "that all expenditures in connection with the construction and maintenance of such switches (meaning industrial tracks) were to be kept entirely separate and not to be taken into the bills against the St. Louis, Kansas City and Colorado Road," that the bills for the construction and maintenance of the industrial tracks were paid directly by the Wabash Company and under his instructions were not to be charged to the Colorado Company or any other company; that if (508) any such items appeared in the bills of the Colorado Company they were placed there by mistake or oversight or misunderstanding of the clerks who made up the bills. He further testified that the Colorado Company paid its rental under the decree, but did not state any fact inconsistent with his testimony above in respect to the cost of the construction and maintenance of the industrial tracks.

We refer to the deposition of Taylor (pp. 320-26, Transcript). Taylor testified that he worked for the Wabash Company from 1898 to July 11, 1901, as a track man; that he and his colaborers of the Wabash Company worked on the main tracks, side tracks and industrial tracks, but he did not testify to any fact in regard to who paid the cost of the construction or maintenance of any of the tracks.

We refer to the deposition of Haynes (pp. 328-33, Transcript). He testified that he was general road master of the Wabash Company and looked after the laboring gangs and work trains; that the employees under him repaired various tracks, but he stated no fact with respect to who paid for the construction or maintenance of the industrial tracks,

We refer to the deposition of Hines (pp. 333-336). He testified (p. 333) he was locomotive engineer of the Colorado Company; was familiar with the property used by the two companies and described the nature of the switch stocks or stands, but did not testify to any fact with respect to who paid for the construction or maintenance of the industrial tracks.

We refer to the deposition of Warren Decker (pp. 336-338, Transcript). He testified he was locomotive engineer (p. 336) of the Colorado Company and described the character and kind of switch stands used, but did not testify to any fact with respect to who paid for the construction or maintenance of the industrial tracks.

We have now exhausted the references made to the testimony of witnesses in the excerpt first above quoted from appellant's brief and have not found a single fact justifying the contention that the Colorado Company paid any part of the cost of the industrial tracks.

Beginning on page 118 of appellant's brief, a number of industrial tracks are treated separately. It will be noted that it is not claimed that the Colorado Company paid anything in connection with tracks 1 and 2. It is stated, however, that the Colorado Company paid its share of the cost of repairing track No. 3, and reference is made in that connection to page 584 of the transcript (memo. 5 of Tate's Exhibit 5). Referring to the transcript, it will be observed that, the Wabash Company included in its bill against the Colorado Company for expenditures on the joint section for May, 1891, an item of $29.85. Included in this item was an item of $11.04 for repairs to "Car-wheel switch," being the industrial track designated in appellant's brief as track 3. The Colorado Company paid its wheelage proportion of this item. The wheelage proportion of the two companies was 87.71 per cent Wabash, 12.29 per cent Colorado, as stated on page 15 of appellant's brief. The Colorado Company's wheelage pro-

portion of the $11.04 was less than $1.50. By examining the references to the record we have made, it will be observed that the track men of the Wabash Company who kept the joint section in repair were sometimes detailed to work on the industrial tracks, and that under the contract between the Wabash Company and the industry the Wabash Company kept the industrial tracks in repair and then billed against the industry for reimbursement. Time does not permit an examination of the record with a view of ascertaining whether the car-wheel company reimbursed the Wabash for this item or whether the Wabash reimbursed the Colorado Company.

Referring again to appellant's brief (pp. 118-19), we find it is claimed that the Colorado Company paid its proportion of the cost of repairs to track 4 in April, 1890, and in February, 1895. With respect to the first item we are referred to deposition of Wabash Railroad Company (Rec., 583, Memo. 3 of Tate's Exhibit 5), which shows that the sum of $32 was expended by the Wabash Company for repairs to track No. 4. It also appears that the total of Kelsey's check-roll for April, 1890, was $535.80, and that the Wabash bill for work on the joint section for that month was $535. While it appears that the Colorado Company paid the bill, it also appears that the bill did not include the $32 item of repairs to track No. 4. The bill was for the amount of Kelsey's check-roll for April, and did not include the item of $32.00.

Referring to the transcript with respect to the repairs made to track 4 in February, 1895, we turn to page 355, where we find that it was agreed that the Wabash included an item of $32.62 in its bill for that month for labor rendered in making repairs to the track referred to as No. 4, and that the Colorado Company paid its wheelage proportion, $4.85.

Track No. 5 is next referred to in appellant's brief, and it is said this track was repaired in April, 1890, and also in February, 1895. The reference with respect to the

April repairs is page 583, Memo. 3 of Tate's Exhibit 5. Turning to the reference, we find it to be the same reference made with respect to track 4. Referring to the repairs made in February, 1895, to track 5, we are referred to page 355, subdivision 16, transcript. An examination will disclose that reference to be the same item of $4.85 previously referred to in connection with the repairs on track 4, February, 1895. The references made in appellant's brief in regard to repairs made to tracks 6 and 7 (p. 119) are precisely the same references made in connection with repairs to track 4. No useful purpose would be served by pursuing an inquiry into each one of the tracks referred to in appellant's brief (pp. 118-29, incl.).

The pages of the record referred to in appellant's brief (pp. 118-29) will disclose the sums paid by the Colorado Company for repairs to industrial tracks. The amounts paid were trifling and scattered through a long period of time. It also appears in every instance that the amount paid was on account of the labor of the trackmen, who made repairs to all the tracks of the Wabash Company. Under these circumstances it was very difficult to separate the repairs to industrial tracks from repairs to other tracks. In any event, the industries reimbursed the Wabash Company or were obliged to do so under the contract, and if the Colorado Company paid any of the items, it was entitled to reimbursement from the Wabash when the Wabash collected from the industries, and presumably it has been reimbursed, although we have not examined the record with respect to that point.

We have examined the record as carefully as our limited time would permit and have failed to find any evidence tending to show that the Colorado Company contributed any sum whatever toward the cost of construction of any of the industrial tracks, and, as above said, the contribution of the Colorado Company to the cost of maintenance was confined to scattered items for labor performed but not for material furnished. An examination of the references made

to the record by appellant will show that the Colorado Company made no contribution whatever towards many items the Wabash Company paid for repairs to the industrial track.

VI.

Industrial tracks were operated under an agreement entirely apart from the decree.

It is not claimed that the decree obligated the Wabash Company to move the cars of the Colorado Company. The Colorado Company has the right to use with its own engines and cars the tracks embraced within the decree. It is conceded by appellant on page 130 of its brief that the switching of the Colorado Company was done by the Wabash Company. It is there said: "Some confusion is created by a reference in the record to the services charged for switching, which has no relation to the rental paid or the cost of maintaining the property. The Colorado Company had no switch engines or cars and the Wabash Company did this work for hire (Rec., 27, par. 15). Mr. McGee says (Rec., 514–15) and Mr. Emerson denies (Rec., 489–90) that this work was done under a verbal agreement to be paid for in proportion to the number of cars switched, no matter whether the switching was done on the main, side or industrial tracks, which was different from the decree, where the wheelage was according to the wheels passed over the main track or parts thereof."

The evidence of Mr. McGee, the general superintendent of the Wabash Company, with respect to the separate arrangement, begins on page 513 of the transcript. He testified that shortly after the decree of 1886 was rendered the superintendent of the Colorado Company took up with him and Charles M. Hayes, then general manager of the Wabash Company, the subject of making an arrangement to cover the switching of the Colorado Company; that it was

finally agreed the Wabash Company would do the switching, and the two companies would share on a wheelage basis the expense of operating and maintaining the yards and industrial tracks, and other facilities that were used in connection with the switching (pp. 514-15). Mr. McGee gave his recollection of the arrangement. Mr. Emerson denied that such an arrangement was made, but it is obvious he was in error, because there must have been some arrangement between the two companies covering the switching. The decree did not cover that matter. By referring to page 27 of the transcript it will be observed that it was stipulated in paragraph 15 that the Wabash Company performed the switching for the Colorado Company and rendered separate bills for that service. By separate bills we mean bills separate from the rental and other items the Colorado Company was required to pay under the decree. Some agreement between the parties must have been made with respect to this matter. Mr. McGee's evidence with respect to the maintenance of the yards, switches, etc., indicates that the arrangement was that the maintenance of all the tracks used in the switching of cars should be borne on a wheelage basis. No doubt the parties referred to the matter in general terms and did not have in mind any particular distinction with respect to the nature of the tracks or the provisions of the decree.

Respectfully submitted,

WELLS H. BLODGETT AND
JAMES L. MINNIS,
Solicitors for Appellee, Wabash Railroad Company.

In the Supreme Court of the United States

October Term, 1908.

THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY, APPELLANT,

v.

WABASH RAILROAD COMPANY AND CITY OF ST. LOUIS, APPELLEES.

No. 253.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS.

1. *The Appeal and Motion to Dismiss.*

(*a*) The Circuit Court for the Eastern District of Missouri, upon a mandate and opinion (152 Fed. Rep., 863) of the Circuit Court of Appeals for the Eighth Circuit, entered a decree that appellant, herein called the Colorado Company, was not entitled to the use of certain industrial tracks of the Wabash Railroad Company in St. Louis. This holding refused to give effect to a decree entered by Mr. Justice, then Circuit Judge, Brewer

(Central Trust Co. *v.* Wabash, St. L. & P. R. Co., 29 Fed. Rep., 546) and here affirmed (Joy *v.* St. Louis, 138 U. S. 1), specifically enjoining the Wabash Company to permit such use. From such decree this appeal was taken to this court, as was also one to the Circuit Court of Appeals. The Wabash Company has filed a motion to dismiss the appeal here upon the ground that it could not be taken directly to this court.

(*b*) To avoid any possible question as to which appeal should be prosecuted, appellant filed its petition for a writ of certiorari, to remove here its appeal taken to the Circuit Court of Appeals. This case is numbered 631. Such was, in Pullman's Palace Car Co. *v.* Central Transportation Company, 171 U. S., 138, held to be the proper course to be pursued if there were any doubt as to the jurisdiction of this court over the appeal taken to it. The motion to dismiss and the petition for certiorari in case No. 631, with the briefs in support thereof and opposed thereto, are to be submitted at the same time.

2. *Briefs for and Against the Motion.*

Appellee has submitted its motion to dismiss upon its brief filed in opposition to the petition for certiorari in case No. 631. As the brief in support of that petition also fully presents the views of appellant upon the motion to dismiss and points out wherein there is here involved a constitutional question, that brief is likewise submitted as appellant's brief upon the motion to dismiss. This brief may also be treated as the brief in reply in case No. 631.

3. *Ground of the Appeal to this Court.*

The appeal was taken to this court upon the ground

that due credit was not given by an inferior court to the decree of the Supreme Court (Petitioners' Brief in No. 631, pp. 10–12), whereby a constitutional question was presented. This because article III, sections 1 and 2, and article VI of the constitution impliedly require (Embry *v.* Palmer, 107 U. S. 9), the same credit to be accorded to a decree of the federal court, as is by section 1, article IV required to be given to one of the state courts. This doctrine is especially applicable here because the constitution in giving this court *supreme power* necessarily implies that its decree cannot be impaired by an inferior court. There thus appears a constitutional inhibition in line with the doctrine stated by Mr. Justice Brewer (Leadville Coal Co. *v.* McCreery, 141 U. S. 475) that no court can annul the decree of another.

4. *Did the Constitutional Question Come into the Case Too Late for the Appellant to Have the Advantage Thereof?*

(*a*) That a constitutional question exists is not seriously denied by counsel. The position taken is that by reason of some peculiarity of the Circuit Court of Appeals system, appellant has been deprived of the right to present the same.

(*b*) The case is this: A decree entered upon the circuit by Mr. Justice, then Circuit Judge, Brewer (29 Fed. Rep., 546) was here affirmed (138 U. S. 1), thus becoming the decree of this court. This gave to the appellant the right to the equal use of all the railroad property of the Wabash Company between 18th Street and Forest Park in St. Louis. After over fifteen years continuous use for *all* purposes, the Wabash Company claimed that the use to which the Colorado Company was limited, was a

through uninterrupted passage over the tracks. No other controversy then existed. (Petition Rec., pp. 10–11, par. 10; answer, Rec. 17, par. 10). Counsel are mistaken in their statement to the contrary. To settle this controversy the Colorado Company filed a petition to enforce the original decree of this court. After a hearing the Circuit Court decided (144 Fed. Rep., 476) that controversy for the Colorado Company but held that the use was limited to a strip of land thirty feet in width, a question for the *first* time discovered by the Circuit Court. Upon appeal to the Circuit Court of Appeals, that decree was reversed (152 Fed. Rep., 863; Rec., 620–621), the holding by a divided court being that the Colorado Company was entitled to the use of all the property upon land owned by the Wabash between the limits, but not to the use of the industrial tracks owned by it but located upon land of others, a distinction never before suggested by anyone. The decree of reversal (Petitioners' Brief in Case No. 631, p. 10) required much action by the trial court, so that (*id.*) it was not final in the sense that authorized a review by certiorari or by appeal had the case been otherwise appealable. This because there was a reversal, not as claimed by counsel because private interests were involved. When the case reached the Circuit Court upon mandate, the *other* questions left open by the Circuit Court of Appeals (152 Fed. Rep., 849, 863; Rec., 619–620) for *new* action, were not presented and a decree as to the industrial tracks was entered in accordance with that portion of the opinion of the Circuit Court of Appeals relating thereto. Before this was done, however, by *consent* of parties and *leave of court* (Rec., 597) the Colorado Company filed an amended petition setting forth that to so exclude it from the use of the industrial tracks and

follow the decision of the Circuit Court of Appeals would impair a decree of this court and thus deprive it of a constitutional right.

Two appeals were then prosecuted, one No. 253 to this court and the other to the Circuit Court of Appeals which is now sought (Case No. 631) to be here removed by certiorari, the petition therefor being submitted with the motion to dismiss Case No. 253.

5. *Remedies to which Appellant was Entitled.*

(*a*) Had the decision of the Circuit Court of Appeals upon the *first* appeal been one of affirmance, the case could have been brought here by certiorari. The case having been reversed and remanded for many purposes certiorari *would not lie.* That decision then was not reviewable here at that time.

(*b*) The *second* appeal to the Circuit Court of Appeals, it is with force claimed, must be there dismissed (Stewart *v.* Salamon, 97 U. S., 361), because the former opinion is the law of the case. That rule does not, however, apply to this court and is no answer to a petition for certiorari (Panama *v.* Napier Shipping Co., 166 U. S., 280).

(*c*) If, however, a constitutional question was in time presented by the amended petition, then an appeal lies to this court. If doubt exists, it can be eliminated by granting the certiorari in compliance with the practice adopted in Pullman's Palace Car Co. *v.* Central Transportation Company, 171 U. S. 138. In any event the motion to dismiss should not be summarily sustained when it can as well be considered at final hearing in the light of oral arguments.

6. *The Constitutional Question was Presented the First Time it Could have Been.*

(*a*) Counsel's position seems to result in this: The law of the case binding the Circuit Court of Appeals prevents that court from entertaining a *second* appeal; hence, the last decree entered by the Circuit Court cannot be elsewhere reviewed. If, however, no inferior court can even by construction constitutionally impair the force of a decree here made, there must be somewhere a method by which this court can review the case in which the attempt is made. So if the former decision of the Circuit Court of Appeals is not, as against this court upon certiorari, the law of the case, is decided in Panama *v.* Napier Shipping Co., 166 U. S. 280, it cannot be said to be the law of the case as against this court upon an appeal presenting a constitutional right timely invoked.

(*b*) It is true that when the original petition to enforce the decree of December 31, 1886, was filed no constitutional question was involved, because up to that time no one could say that any inferior court would refuse to accord full faith and credit to a decree of this court. When a decision to such effect was made by the Circuit Court of Appeals, then for the *first* time a constitutional question became involved. The case could have been removed here by certiorari if the decree had been one other than of reversal. Being one of reversal, and the trial court directed to enter in one respect a decree impairing that of the Supreme Court, the constitutional right could for the *first* time only be denied by the actual entry of the decree in the trial court. Accordingly, by consent of court and counsel, an amended intervening petition was filed before the decision, raising the constitutional question involved. This being by *consent* of

parties, and *permitted by the trial court*, must be said to have been strictly in accordance with the practice of that court, and hence raised the question in time with the same effect as if presented when the intervening petition was filed.

This presented a distinct constitutional question, arising upon the petition for relief, and necessarily justified an appeal to this court.

Respectfully submitted,

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN,
Solicitors for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY,
Appellant,

CITY OF ST. LOUIS AND THE WABASH RAILROAD COMPANY,
Appellees.

No. 253.

MOTION OF WABASH RAILROAD COMPANY, APPELLEE, TO DISMISS APPEAL.

Now comes the Wabash Railroad Company, one of the appellees, and moves the Court to dismiss the above entitled cause, and as reasons therefor assigns the following:

I.

This Court has not jurisdiction of this cause, that is to say, the decree from which this appeal was allowed, was entered in exact accordance with a mandate handed down by the United States Circuit Court of Appeals for the Eighth Circuit, on a previous appeal prosecuted by appellant, as appears from said mandate (page 621, *et seq.*, Transcript) said decree (p. 625, *et seq.*, Transcript) the opinion of the Court (page 603, *et seq.*, Transcript) and the order allowing the appeal (p.

226, Transcript); and it further appears that no proceedings subsequent to the entry of said decree were had in the Circuit Court (p. 626 Transcript). (See p. 4 of Appellant's Petition for writ of *certiorari* filed in connection with this motion wherein the above facts are admitted.)

II.

The jurisdiction of the cause in which the decree appealed from was rendered depended entirely upon the opposite parties to the suit or controversy being citizens of different States.

(See p. 9 appellant's brief in support of its petition for writ of *certiorari* submitted with this motion where the above facts are admitted.)

III.

The cause below did not involve the construction or application of the Constitution of the United States or the constitutionality of a law of the United States or the validity or construction of any treaty made under its authority, or a State law claimed to be in contravention of the Constitution of the United States or the jurisdiction of the court below. (See application and motion on which suit was founded, p. 3 *et seq.*, Transcript, and mandate p. 621 *et seq.* Transcript and decree, 925 *et seq.*, Transcript, and appellant's petition for a writ of *certiorari* and brief in support.)

Respectfully submitted,

William Baldwin and
James L. Minnis

Solicitors for Appellee, Wabash Railroad Co.

BRIEF IN SUPPORT OF MOTION.

This motion will be submitted in connection with appellant's petition for a writ of *certiorari* and brief in support, and our brief in opposition, wherein the questions presented by this motion are fully considered. We therefore respectfully request the Court to consider, in connection with this motion, said petition and briefs.

Walter H. Blodgett and
James L. Minnis
Solicitors for Appellee, Wabash Railroad Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 57.

THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY, APPELLANT,

v.

WABASH RAILROAD COMPANY AND CITY OF ST. LOUIS, APPELLEES.

APPELLANT'S BRIEF.

STATEMENT.

I.

THIS APPEAL, MOTION TO DISMISS IT, AND THE PETITION FOR CERTIORARI IN CASE NO. 301 ARE TO BE CONSIDERED TOGETHER.

(1) The Circuit Court for the Eastern District of Missouri, upon a mandate (Rec. 593-596, 621-624) and opinion (Rec. 601-621, 81 C. C. A. 643, 152 Fed. Rep. 849) of the Circuit Court of Appeals for the Eighth Circuit, entered a decree (Rec. 624-625) that appellant was not entitled to the use of certain industrial tracks of the Wabash Railroad Company in St. Louis. This holding refused to give effect to a decree entered by Mr. Justice, then Circuit Judge, Brewer (*Central Trust Co.* v. *Wabash St. L. & P. R. Co.*, 29 Fed. Rep. 546,) and here affirmed (*Joy* v. *St. Louis*, 138 U. S. 1, 34 L. Ed. 843) specifically enjoining the Wabash Company to permit such use. From such ruling this appeal was taken to this court, as was also one to the Circuit Court of Appeals, the latter being taken as a matter of precaution, a course frequently pursued (*Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 43 L. Ed. 108, 111, 112; *Burton* v. *U. S.*, 196 U. S. 283, 49 L. Ed. 482; *Pierce* v. *Creecy*, 208 U. S. 616, 52 L. Ed. 646, 210 U. S. 387, 52 L. Ed. 1113). The Wabash Company filed here at last term, a motion to dismiss this appeal upon the ground that it could not be taken directly to this court.

(2) To avoid any possible question as to which appeal should be prosecuted, appellant filed its petition for a writ of certiorari, to remove here its appeal taken to the Circuit Court of Appeals. This case is numbered 301. Such was, in *Pullman's Palace Car Co.* v. *Central Transportation Company*, 171 U. S. 138, 43 L. Ed. 108, 111, 112, held to be the proper course to be pursued if there were any doubt as to the jurisdiction of this court over the appeal taken to it. The motion to dismiss and the petition for certiorari in case No.

301, with the briefs in support of and opposed to each, were submitted at the same time and the court made an order continuing both to be heard with this case upon the merits. The records in the two cases from pages 3 to 625 inclusive are exactly the same. The only difference in the two records is in the designation of the Courts to which the respective appeals were taken.

(3) The Wabash Company submitted its motion to dismiss upon its brief filed in opposition to the petition for certiorari in case No. 301. As the brief in support of that petition also fully presented the views of appellant upon the motion to dismiss and pointed out where there is here involved a constitutional question, that brief was likewise submitted as appellant's brief upon the motion to dismiss. A short brief in reply was filed. It is, therefore, unnecessary to now deal with anything but the merits of the case, as those briefs (already filed) cover the other questions reserved for hearing at final argument.

II.

CAUSE PENDING BELOW AND SOUGHT TO BE REVIEWED EITHER BY APPEAL OR CERTIORARI.

(1) Appellant as an intervenor, in a cause pending below, there sought to enforce (Petition, Rec. 3-13) a decree (Rec. 4-7) in its favor entered by Mr. Justice, then Circuit Judge Brewer, in the United States Circuit Court for the Eastern District of Missouri, December 31, 1886 (29 Fed. Rep. 546) afterwards affirmed here (*Joy* v. *St. Louis*, 138 U. S. 1, 34 L. Ed. 843)

against the Wabash Railroad Company, requiring the latter to accord to intervenor the equal use of its entire "right of way, tracks, side-tracks, switches, turnouts, turntables and *other terminal facilities*" in St. Louis between the north line of Forest Park and 18th Street. The court had, upon the insistence of the Wabash Company, held that the compensation previously fixed by the master should be increased because the Colorado Company, by virtue of the decree, obtained the rights to the use of *all the terminals*, including industrial tracks. For over fifteen years such use had been accorded as required by the decree, being for the first time denied on May 7, 1902. That decree will, for convenience be called herein the "Old Decree."

(2) The answer (Petition, Rec. 10, 11, par. 10. Answer, Rec. 17, par. 10) of the Wabash Company to this intervention was that while the Colorado Company could use all the property, it could make use of same only for through uninterrupted passage. Thus the controversy was quite narrow, i. e., whether appellant was limited in its use to the continuous and uninterrupted passage of its trains. After an extended trial (Rec. 23-592), a decree (Rec. 593, 594, 597) was entered upon this petition for enforcement denying the claim of the Wabash Company, but *limiting* the use of the appellant, under the decree, to that part only of the right of way upon a strip 42 feet wide through Forest Park and 28 to 30 feet wide from the Park to 18th street, the opinion of Judge Rogers, the trial judge (144 Fed. Rep. 476) being that neither Mr. Justice Brewer, who entered the original decree, nor this court in affirming the same, intended their *general* language in giving to appellant the equal use of the *en-*

tire right of way and *all* terminal facilities, to apply to more than such narrow strip and *part* thereof. This was in reality a new discovery and not the claim asserted by the Wabash Company in its answer.

(3) An appeal was then taken to the Circuit Court of Appeals for the Eighth Circuit, to which, in the absence of a jurisdictional or constitutional question the case had to go (*Mason v. Pewabic Mining Co.*, 153 U. S., 361, 38 L. Ed., 745) which reversed (Rec 624) and remanded the case "with instructions to render a decree not inconsistent with the views" expressed in the opinion of Judge Sanborn (Rec. 601-621, 152 Fed. Rep., 849-856), that the intervenor was entitled to the equal use of the *entire* strip of land between the east line of the Park and 18th street *owned* or the right to use which had been acquired by the Wabash Company when the "Old Decree" was rendered, and *all* terminal facilities thereon, but was "not entitled to the use * * * of any * * * industrial or railway facilities of the Wabash Company" *not on that particular strip*, a limitation never before suggested by anyone. Judge Hook vigorously dissented (Rec. 620, 621, 152 Fed. Rep., 863) from this exception, but concurred in the rest of the opinion. This being a decree of reversal where private interests were involved and not one which was final, the case could not have *then* been brought here by certiorari (*C. & N. W. R. Co.* v. *sborne*, 146 U. S. 354, 36 L. Ed., 1002; *Forsythe* v *Hammond*, 166 U. S., 506, 574, 41 L. Ed., 1095, 1098; *Taylor* v *Louisville etc., R. Co.*, 172 U. S. 648, 43 L. Ed., 1182) nor by appeal (*MacLeod v. Graves*, 79 Fed. Rep., 84; *Lubin* v. *Edison*, 195 U. S., 624, 49 L. Ed., 349) so intervenor was remediless until a new decree was entered.

(4) When the mandate (Rec. 593-596) reached the Circuit Court, appellant by leave of court and *consent* of parties (Rec. 597) filed an amendment to its petition (Rec. 597-600) setting up the action aforesaid, the mandate of the Circuit Court of Appeals and averring that neither the Circuit Court of Appeals not the Circuit Court had any right to exclude it from the use of the industrial tracks of the Wabash Company beyond the limits of the land owned by it, and to enter a decree so doing would fail to give full faith and credit to that entered by Mr. Justice Brewer and the mandate of affirmance from this court, all contrary to sections 1 and 2 of article III and article VI of the Constitution of the United States, it having been said in *Embry* v. *Parker*, 107 U. S. 9, 27 L. Ed. 346, 349, that these sections required to be accorded to a decree of a federal court, the same full faith which must be given under section 1, article IV to one of the state courts.

(5) The Circuit Court, by Judge Rogers, then entered a new decree (Rec. 624, 625) giving appellant the use of all the property upon the particular strip of land the title or use of which had at the time of the entry of the "Old Decree" been acquired by the Wabash Company between Forest Park and 18th street, but excluding it from the use of its industrial tracks between said points on land *not so acquired*, holding that if any parts of any of the industrial tracks were between such points and owned and used by the Wabash Company, yet not located upon the specific strip of land acquired by the company, (although adjacent thereto, connected therewith, and only usable because thereof) they were not then within the benefit of the decree. From this decree an appeal (Rec. 626 in Case No. 301) was for the

second time, taken to the Circuit Court of Appeals, to remove which a petition for certiorari is here pending as No. 301, to be argued here with this case.

(6) This appeal (Rec. 626) was also taken directly to this court upon the ground that full faith and credit had not been given to its decree as required by sections 1 and 2 of article III of the Constitution. There being a possible doubt as to which appeal should be prosecuted, this court being the one which should finally decide the case, the course sought to be adopted was to follow the practice pursued in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 43 L. Ed. 108, 111, 112, by filing here a petition for a certiorari to bring up the other record in the hope that this court would grant this petition and hear both appeals at the same time.

With these preliminary suggestions we turn to the merits of the case.

III

CASE UPON MERITS.

(1) THE CASE APPEALED.

In 1886 there was pending in the Circuit Court for the Eastern District of Missouri a consolidated railroad mortgage foreclosure and receivership case of the Central Trust Company, et al., vs. Wabash, St. Louis & Pacific Railroad Company, et al., numbered 2357 and 2464, (herein for convenience called the "Main Case".) In that case the St. Louis, Kansas City & Colorado Railroad Company, (herein called the "Colorado Company,") filed a petition of intervention (Rec. 31-37) afterwards amended (Rec. 154-160), seeking by virtue

of certain contracts made with the public, to enforce a right to use with its trains, upon fair terms, the entire right of way of the Wabash Company in St. Louis, between the north line of Forest Park and 18th street. Upon December 31 1886, there was entered thereon a decree (Rec. 292-296) herein called the "Old Decree", in favor of the Colorado Company which, upon appeal, was affirmed (Rec 25, par. 10; 138 U. S. 1, 34 L. Ed. 843) and under which the property has since been continuously used. In 1902 a difference arose between the parties as to the character of the use to which the Colorado Company was entitled. A petition (Rec. 3-13) was then filed by it to construe and enforce the decree. After answer (Rec. 13-19) and replication (Rec. 22, 23), proofs were offered (Rec. 23-589), consisting mainly of stipulations and records hereinafter set forth in detail, and a decree (Rec. 593, 594) entered to the effect that while the character of the use of the Colorado Company was as it contended, yet that such use was limited to a portion of such right of way thirty feet in width. From this decree the Colorado Company appealed (Rec. 595) to the Circuit Court of Appeals, where there was a reversal (Rec. 595-596; 601-621, 81 C. C. A. 643, 152 Fed. Rep. 849, 863), the entire court holding that there was no such limitation in width, a majority also holding that there was no right to the use of such portions of the industrial tracks as were not located upon the particular strip of land acquired on or before the date of the entry of the "Old Decree." Thereafter, a new decree was by the Circuit Court entered (Rec. 624-625) in accordance with that opinion. To reverse this last decree is the object of this appeal.

(2) OLD DECREE SOUGHT TO BE ENFORCED.

The "Old Decree" (Rec. 47, 292-296-442) so sought to be enforced gave to the Colorado Company in most sweeping terms the right to *fully* use upon equal terms *all* of the "right of way, tracks, side-tracks, switches, turnouts, turntables and *other terminal facilities*" owned by the Wabash Railroad Company, (herein called the "Wabash Company") "between the north line of Forest Park and 18th street in St. Louis" or Tayon avenue, this being "the west end of the Union Station in St. Louis." The land consisted of a strip of varying and irregular width, ranging up to more than 200 feet in places, upon which there were located (at the time of the entry of the "Old Decree") main and side tracks, switches, turntables, turnouts and such other terminal facilities as in a city are usually located on a railroad right of way. Between the same points, partly upon and leading from this land, there were short tracks to and from private industries along and adjoining the same, furnishing to such industries their only railroad outlet connecting them with the main tracks, and constituting part of the "terminal facilities" of the Wabash Company. This property was shown in detail upon two maps, one, Chart A (Rec. 591) used in the Main Case (Rec. 50, 51, 86), and the other, Exhibit "D" (Rec. 592) prepared for this case (Rec. 27, par. 14) showing the same land and the tracks as they were at the time of the trial below, the only changes since the entry of the decree in the main case being the addition of some industrial tracks, the date of the construction thereof being shown thereon and hereafter enumerated (Argument, Div. VII).

(3) RIGHTS AS HERETOFORE EXERCISED WERE AS CLAIMED BY THE COLORADO COMPANY.

The right sought to be enforced, i. e., the equal right to use the *entire* right of way, *regardless of width*, together with each and every part of the industrial tracks, and all terminal facilities was, by the Colorado Company continuously exercised, and the rent therefor fully paid, from the time of the entry of the "Old Decree" in the Main Case on December 31, 1886, until May 7, 1902, when the Wabash Company *for the first time* claimed (Motion, Rec. 10-11; Answer, Rec. 17, 18) that the Colorado Company had no right, under that decree, "except to use the main track * * * for passing trains and passing tracks *for the sole purpose of permitting trains to pass each other.*"

(4) CONTENTION OF THE PARTIES.

That such was, when the motion was filed, the *sole* issue between the parties is plain. The motion (Rec. 10-12) averred that on May 7, 1902, the Wabash Company for the first time claimed that the use to which the appellant was entitled was only for passing trains and that the tracks could not be used for any other purpose, not even to reach industrial tracks. The answer (Rec. 17, 18) admitted the controversy to be so limited to the use which appellant could make of the property.

There was *then* no difference between the parties as to the *width* of the right of way, and never any pretense that the right of way was limited in *width*, nor, until the Circuit Court of Appeals decided the case, that the industrial tracks could not be used, for up to that time the contention had been only that the regular

Wabash tracks could not be used to reach the industrial tracks, because they could only be used for continuous passage.

(5) How the Question was Presented and View Taken by the Trial Judge.

Under the foreclosure decree in the Main Case, the property was acquired by the Wabash Western Railway Company, which was required to, and did, enter its appearance therein (Rec. 317, 318), and thereafter consolidated with the Wabash Railway Company (Rec. 24) and agreed (Rec. 24, Partial Agreed Statement, par. 6) that the same relief could be had herein against it as could have been had against the purchaser at the foreclosure sale. Thereupon, the Colorado Company filed its motion (Rec. 3-12) to construe and enforce the "Old Decree" in the Main Case by such process as might be appropriate. Answer (Rec. 13-20) and replication (Rec. 22-23) were duly filed. These were the pleadings upon which were made the issues between the parties. A large amount of testimony was taken (Rec. 23-592), at the close of which Judge Rogers at the first trial held (Decree, Rec. 597-599, Opinion, 144 Fed. Rep. 476) that the use to which the Colorado Company was entitled to put the property was as claimed by it, *equal* to that made by the Wabash Company, and not as claimed by the latter, *limited* to the mere passing of trains, but that such use was limited to a *part* only of the right of way, a mere strip from 28 to 30 feet wide, the effect of which was to exclude the Colorado Company from any practical use of the turnouts, turn-tables, and other terminal facilities expressly mentioned in the decree, because none of these were upon such a strip. His view, upon which was based

the decree appealed from, was that the agreement upon which the "old decree" was founded, only gave to the Colorado Company the right to use as a right of way a continuous strip of ground 42 feet wide through the park and 28 to 30 feet wide from the park to 18th Street, *all* of which was acquired by the tripartite agreement from the St. Louis County Railway Company, herein called the County Company, a predecessor in title. This view was wholly unwarranted in fact and in law, was a misconception originating with Judge Rogers, and not even based upon the contention of the Wabash Company, as was decided by all the judges upon appeal (81 C. C. A. 643, 152 Fed. Rep. 849; Rec. 601).

6. Origin of the Right Claimed.

In 1875, the St. Louis County Railway Company, herein called County Company chartered as a narrow gauge road, claimed a railroad right of way 70 feet in width through Forest Park, one of the public parks of St. Louis. It had, preparatory to building a line into that City, acquired a number of detached lots between the Park and the Union Depot, but far from enough to either make a continuous or sufficient right of way for a modern railroad in a large city. The St. Louis, Kansas City & Northern Railway Company, herein called the Kansas City Company, then had a line extending from Kansas City to the northern line of the Park, where it connected with the right of way of the County Company. These two companies then entered into a written contract (Rec. 235-240) in which the County Company agreed to convey to the Kansas City Company a strip 28 feet wide through each lot then owned by it, between the eastern line of the Park and the then

western limits of the city, and a strip 30 feet in width through each lot owned by it lying between the then western city limits and the Union Depot at 18th street, and an undivided half interest in its claimed right of way through the Park. The Kansas City Company was, at its own expense, to make a tunnel and cut for the joint use of the two, just east of the Park. The County Company was to complete its road and reimburse the Kansas City Company for one-half of the cost of such tunnel and cut, failing in which, as it did, it was to relinquish all claims to its use. Thereupon the County Company conveyed (Rec. 247-258) to the Kansas City Company said strips 28 feet and 30 feet wide respectively, off of the lots owned by it, and an undivided half interest in a right of way through the Park, and thereafter, by purchase and condemnation of other property, the Kansas City Company completed a right of way of varying and somewhat extensive width to the Union Depot. These two companies entered into an agreement (Rec. 241-247) with the commissioners of Forest Park, herein called the "tripartite agreement," by which, among other things, it was agreed that the right of way *claimed* through the Park should be reduced from 70 to 42 feet, and enjoyed upon the condition that the *County Company* should permit "other railroads to use *its* right of way through the Park and up to the terminus of its road in the City of St. Louis," but if it should, as it subsequently did (Rec. 86), cease to have, maintain and enjoy any right or privilege granted it, such right and privilege should, nevertheless, continue in the Kansas City Company, *but upon the same terms and conditions* i. e., that any other company could use the *right of way* of the *Kansas City Company* through the Park and up to the

Union Depot. The County Company not having a *continuous* right of way between the Park and 18th street, and never completing its road, the Kansas City Company acquired one (Stipulation Rec. 196-197), so that in the end it, or its successor, into which it was merged, the Wabash, St. Louis & Pacific Railway Company, had a *complete* strip of land for a railroad to the Union Depot, as shown by Chart A (Rec. 78, 591), the portions in blue indicating (Rec. 50, 51, 86) the *incomplete* part of a right of way owned by the County Company, and by it conveyed to the Wabash Company. So that it is plain that the right of way to the use of which the Colorado Company was entitled was not, as assumed by the trial court at the first trial limited to that acquired by the tripartite agreement or from the County Company, but was that of the Wabash Company, and there was, as will be hereinafter shown, no limitation either as to its width or as to how, when, or from whom, it had been acquired. So it was decided in the Main Case (*Joy* v. *St. Louis*, 138 U. S. 1, 34, 34 L. Ed. 843), and so the Circuit Court of Appeals unanimously held (Rec. 601, 81 C. C. A. 643, 152 Fed. Rep. 849). The sole controversy now is whether the Colorado Company was excluded from the use of such parts of the industrial tracks as were not located upon the particular strip of land.

(7.) Construction by the Parties of the "Old Decree" and the Contract Upon Which it was Based.

(a). The "Old Decree" made the words "right of way", all that were used in the contract, also include "tracks, sidetracks, switches, turnouts, and *other ter-*

minal facilities." This accorded with the views expressed by Mr. Justice, then Circuit Judge, Brewer (29 Fed. Rep. 546,) and Mr. Justice Blatchford (138 U. S. 1, 34 L. Ed. 843) and finds support in the subsequent opinions of Judges Sanborn (Rec. 601-620; 152 Fed. Rep. 849-863,) and Hook (Rec. 620-621; 152 Fed. Rep. 849, 863-864).

From its date, December 31, 1886, for more than sixteen years, no one questioned its meaning. When, however, the Colorado Company became part of the system of The Chicago, Rock Island & Pacific Railway Company, which was an active competitor for the business of the Wabash Company, a difference arose between the parties, and upon May 7, 1902, the Wabash Company, for the *first* time (Motion, par. 7, Rec. 9, Partial Agreed Statement par. 16, Rec. 28) attempted to limit its words so as to give to the Colorado Company only the use of the Wabash rails for the mere passing of trains. No one, however, before the first decision of Judge Rogers, ever attempted to limit the *width* of the right of way, the use of which was accorded by the "Old Decree," even the answer (Rec. 13-19) making no such claim.

(b) In the meantime, for over sixteen years, and up to the date of the first trial below, the Colorado Company, with a wheelage (Rec. 432, 433-439) of 12.29 per cent as against that of the Wabash Company of 87.71 per cent, under the terms of the decree, paid $30,000 per year cash rental (Rec. 26-27, Partial Agreed Statement, Par. 13), or nearly $500,000, representing a sum equaling one-half of six per cent annual interest upon the valuation of all railroad property, regardless of its width, char-

acter or use, between the Park and 18th street (Decree in Main Case, Rec. 293-294); its proportion of *all* the taxes upon *all* of said property (Rec. 25-26, Par. 11); its proportion of *all* the repairs and of *all* the maintenance of *all* such property, including the yards and other property (Rec. 26, Partial Agreed Statement, Par. 12; Evidence Pryor, Rec. 508, 509, 510, 511; Petition in Luke case, Rec. 440-475), and whenever anything was paid by the Wabash Company upon acount of any industrial track between 18th street and the Park, *no matter where located or with what part of the right of way it was connected*, the Colorado Company was charged with and paid, under the decree, its proportion of the amount paid on account thereof by the Wabash Company (2nd Agreed Statement, Rec. 347-360; Depositions Taylor, Rec. 320-326; Haynes, 328-333; Hines, 333-336; Decker, 336-338).

(8.) Question Here Presented.

The question between the parties is, whether the decree does, as it reads, give the Colorado Company the right to "*the equal use and benefit* of said *right of way*, tracks, switches, side tracks, turnouts, turntables and *other terminal facilities*", or whether such equal use is, by construction, to be limited to an unequal use, of the particular strip of land acquired as a right of way, by depriving appellant of the use of the terminal facilities *expressly* mentioned in the decree, which were in fact adjacent to and connected with the tracks and themselves partially located upon the strip of land, and only of use or value because of such connection, being short tracks leading from the main line and right of way proper to adjoining private industries, constructed by the Wabash

Company which furnished the material and located in part upon the land of the industries.

(9.) THE MOTION OR PETITION UPON WHICH WAS ENTERED THE DECREE APPEALED FROM.

The Colorado Company filed in the Main Case its motion or petition (Rec. 3-13) in which was set forth (a) the entry of the "old decree" (Rec. 4-7) of December 31, 1886 and its affirmance (Rec. 7) giving it the right to the equal use of the entire right of way of the then Wabash, St. Louis & Pacific Railway Company between the north line of Forest Park and 18th street in St. Louis, Missouri, and requiring it to pay therefor, a fixed rental of $2500.00 per month, or at the rate of six per cent annual interest upon one-half the valuation of the entire property and all terminal facilities between said points; and to pay in addition thereto its proportion upon a wheelage basis of the taxes and maintenance thereof; (b) the purchase of the property under mortgage foreclosure decree by the Wabash Western Railway Company, which was required to and did enter its appearance as a party to the still pending Main Case, which company afterwards by consolidation became the Wabash Railroad Company, the present owner; (c) the fact that up to May 7, 1902, the Colorado Company continuously used the entire property under and in accordance with the decree, when the Wabash Company for the first time claimed (Rec. 13) that the Colorado Company had no right under the decree "except to use the main tracks * * * for passing trains and passing tracks for the sole purpose of permitting trains to pass each other," and (d) insisting upon such claim, and in excluding the Colorado Company from any other use, the motion or petition was filed to construe and enforce the decree.

(10.) THE ANSWER AND REPLICATION.

The answer (Rec. 13-20) practically admitting all the averments of the motion except as to the meaning of the decree, set forth (Rec. 17) that

> " * * this defendant and its predecessors have always claimed and still claim, that petitioner has only the right of ingress and egress with its trains, engines, etc., to and from Eighteenth street over this defendant's right of way and no right to the use of said right of way or tracks or other facilities *thereon for any other purpose*, and no right to reach any of the industries along said right of way, or to load or unload cars, or to receive or deliver freight, on any of said side-tracks, or on said right of way between Union avenue and Eighteenth street aforesaid, under said decree."

The replication (Rec. 22-23) put the case at issue.

(11.) PROOFS IN THE CASE.

The proofs consisted of:

First. The first partial agreed statement of facts (Rec. 23-29). This, among other things, incorporated as exhibits, Chart A (Rec 591), showing (Rec. 35) the property, of varying width as it was when the decree in the Main Case was entered, and in blue color (Rec. 50, 51, 86) the portion thereof acquired from the County Company; and exhibit "D" (Rec 592) showing (Rec. 27) the tracks thereon, there having been no additional land acquired since the entry of the decree in the Main Case; also the record in the Main case, Exhibit "B" (Rec. 30-313), and the form of contract (Rec. 313-315) under which all industrial tracks were constructed, by the

was to be paid by the industry, and material furnished by the Wabash Company.

The facts so agreed in substance were: (a) The particular strip of land of the Wabash Company, between the north line of Forest Park and 18th street, at the time the Colorado Company filed its petition of intervention in the Main Case, was (par. 1) as shown on Chart A (Rec. 591). The extent of this strip has not been since changed, but some additional adjacent and connecting industrial tracks have been (par. 14) laid thereon and to and from same, as shown by Exhibit "D" (Rec. 592) under contracts in form shown by Exhibit "C" (Rec. 313-315) providing that the cost of construction and maintenance should be borne by the industry and materials furnished by the Wabash Company. (b) The Main Case was a foreclosure proceeding against the Wabash, St. Louis & Pacific Railway Company, in which were appointed receivers, the decree of foreclosure retaining jurisdiction of the cause. Under the foreclosure decree the title to the mortgaged property vested, subject to the right of the Colorado Company, in the Wabash Western Railway Company, which was required to and did enter its appearance as a party; all as shown by the extracts from the record afterwards offered (Rec. 315-316), the Wabash Western Company thereafter consolidating with other companies into the Wabash Railroad Company, which, for the purposes of the proceeding, was to be regarded as "subject to all such liability and procedure under said decree as was the Wabash Western Railway Company" (Par. 2-6). (c) The Colorado Company filed in the Main Case its intervening petition and the proceedings had therein were such as are set forth in Exhibit "B"

(Rec. 30-313) resulting in a decree giving it in words the right to use all of the property of the Wabash Company, including terminal facilities, between the north line of Forest Park and 18th street, which decree was affirmed, the report thereof (138 U. S. 1) being by reference made part of the record (Par. 8-10); (d) The Colorado Company, in accordance with the decree it thus obtained, at all times thereafter paid the taxes upon all such property, regardless of its width (par. 11) and likewise its proportion of the maintenance of the same (par. 12) except as to the industrial tracks, as to which, the matter was left open to proof. As to these, there were many upon which the Colorado Company made payment (2nd Partial Agreed Statement of Facts, Rec. 347-360; depositions B. F. Taylor, Rec. 320-326; A. S. Haynes, Rec. 328-333; Michael Hines, Rec. 333-336; Warren Decker, Rec. 336-338), though there was some unsatisfactory proof, (most of the Wabash records having been lost or burned) that there were instances when the Wabash Company did not collect from the Colorado Company for some industrial tracks (Depositions for Wabash Co., Rec. 475-582), a fact of little value and of no significance, since, under the contracts (Rec. 313-315) with the industries, the latter were required to, and in such cases did, pay for the construction and maintenance of all such tracks, so that they cost the Wabash Company nothing, and hence it would not have been proper to have made a collection on account thereof from the Colorado Company.

Second: A portion of appellant's argument (Rec. 29) in the supreme court and appellee's answer thereto (Rec. 29-30). In this argument, appellant therein con-

tended that the decree was broader that the contract upon which it was based, and broader than the prayer of the intervening petition, in that it gave to the Colorado Company the right to the use of all of the Wabash property between Forest Park and 18th street and its terminal facilities, and was not limited to such portion of the land as had been by the tripartite agreement acquired from the County Company.

Third: Provisions of the foreclosure decree in the Main Case retaining jurisdiction of the cause (Rec. 315) confirming title in the Wabash Western Railway Company upon condition (Rec. 316) that it took the property subject to all orders and decrees entered in the cause, and requiring it to enter its appearance as a party, which it (Rec. 316) subsequently did.

Fourth: Depositions of B. F. Taylor (Rec. 320-326), A. S. Haynes (Rec. 328-333), Michael Hines (Rec. 333-336), Warren Decker (Rec. 336-338), and exhibits thereto, showing that the Colorado Company *had been charged with and paid its proportion upon a wheelage basis of the maintenance of tracks extending to private industries,* just as it paid its proportion, under the decree, for the maintenance of the other property.

Fifth: The second partial agreed statement of facts (Rec. 347-360) showing repeated instances in which the Colorado Company was so charged for a proportion of the maintenance of industrial tracks, from which it appears that either the Wabash Company departed from the terms of the usual contracts (Rec. 313-315) and made some payments on account of industrial tracks or collected from the Colorado Company on account

thereof, when the private industry and not the Wabash Company had actually borne the expense. The presumption is that when it collected from the Colorado Company for construction, it, and not the industry, had paid the cost.

Sixth: Depositions of S. T. Emerson (Rec. 425-427) and William Mitchell (Rec. 427-432) showing that the Colorado Company always paid, as was admitted (Rec. 508-509) by E. B. Pryor, a chief officer of the Wabash Company, and was always required to pay under the decree, for the maintenance of all the property, including the terminals, between the north line of the Park and 18th street, without any limitation as to its width or the character of the use made thereof.

Seventh: Exhibit A (Rec. 433-439) proven to be correct by the undisputed evidence of R. W. Andrews (Rec. 431-432) showing the wheelage of the two roads from 1887 to 1902, and that the entire use, the Colorado Company only had an average of 12.29 per cent as against 87.71 per cent by the Wabash, although for all these years the Colorado Company paid a fixed rental of $30,000 per year upon the basis of being entitled to one-half of the use of the entire property.

Eighth: Intervening petitions (Rec. 440-475) filed by the Wabash Company in the pending foreclosure receivership of the Colorado Company. These interventions presented bills for rentals, taxes and maintenance which had accumulated under the decree in the Main Case, and alleged that all the cost of all the maintenance was charged under the decree (Rec. 444-447, 463); that the rental and maintenance charges were for all the property, including the *shops* which

were not claimed to be on any 28 or 30 foot strip without a suggestion of limitation in width or otherwise (Rec. 442, 444, 445, 446, 461, 463, 471, 472) and that under the decree the Colorado Company was entitled (id.) to the use of all such property.

Ninth: Depositions in behalf of the Wabash Company (Rec. 475-589) consisting of those of William F. Tufts (Rec. 476-486), B. F. Taylor (Rec. 486-507), E. B. Pryor (Rec. 507-513), Henry L. Magee (Rec. 513-525), William M. Tait (Rec. 525-536), and Fred W. Woerheide (Rec. 536), together with exhibits thereto (Rec. 542-589). From these depositions it appeared that upon some industrial tracks some work was done, no part of which was charged to the Colorado Company. This proof is of little value because most of the records, of the Wabash Company are missing or have been burned, and because under the contracts (Rec. 313-315) for these tracks the owners of the industries were to make the payment. If they did so there was no right to call upon the Colorado Company for any part thereof.

(12.) Proofs in the Case Continued. Record in Main Case.

1st. Exhibit "B" (Rec. 30-313) to said partial agreed statement of facts, contains the record in the intervention in the Main Case, consisting of; Intervening petition (Rec. 31-38); exhibits thereto (Rec. 38-44); orders of reference (Rec. 45-46); evidence upon the first hearing before the Master (Rec. 47-123); first report of Master (Rec. 123-151); Judge Brewer's first opinion (Rec. 151-153); order of re-reference (Rec. 153-154); amended intervening petition (Rec. 154-161); answer thereto (Rec.

161-177); replication thereto (Rec. 177); testimony upon re-reference (Rec. 178-203); master's second report (Rec. 203-225); exceptions thereto (Rec. 225-234); agreement of St. Louis, Kansas City & Northern Railroad Company (Rec. 235-240); tripartite agreement (Rec. 241-247); exhibits thereto (Rec. 247-288); petition of purchasing committee to become parties (Rec. 288-291); order allowing same (Rec. 291-292); final decree (Rec. 292-296); opinions of court (Rec. 296-313.)

2nd. From this record this appears: The Colorado Company was on, and has been since July 12, 1886, a railway corporation organized and existing under the laws of Kansas, owning and operating a line of railway extending from the west to a point where the same intersects with the north line of Forest Park in St. Louis (Rec. 24-25, Par. 7). On July 12, 1886, it was desirous of entering St. Louis and using for that purpose the road and property of the Wabash Company from the north line of Forest Park to 18th street, or Tayon avenue, which was the west line of the Union Depot. Accordingly there was on that date filed (Rec. 25) in the "Main Case," a petition of intervention (Rec. 31-38; 138 U. S. 1, 2) by the Colorado Company and the City of St. Louis to enforce such right, based on the contention that the Wabash Company *obtained its right to run through Forest Park* (established and placed under control of commissioners by state law; Laws of Mo. 1874, p. 371) upon an agreement (Rec. 241-247) to permit any other railroad company, upon fair and equitable compensation, to use *its right of way* from the north line of Forest Park through the park and to its terminus at 18th street in St. Louis, of which right intervenor desired to avail itself. The intervention was first referred (Rec. 45) to

Edmund T. Allen as Special Master, for whom George H. Shields was (Rec. 45-46) subsequently substituted. No answer was filed, but much testimony was taken by both parties upon the first hearing (Rec. 47-123) before the Master, who reported (Rec. 123-151) that, (a) the Wabash Company was bound to grant to the Colorado Company the right demanded; (b) the value of the property to be used was fixed at $1,000,000, and the total value of its use was 6 per cent per annum, of which the Colorado Company should pay its proportion upon a wheelage basis, and upon a like basis pay for all repairs, maintenance and the expense of operation of the tracks; (c) the trains should be operated under the rules of the Wabash Company, subject to the supervising control of the court; (d) the right thus found should be enforced by the mandatory injunction. Mr. Justice, then Circuit Judge, Brewer upon this report delivered (Rec. 151-153) an opinion saying that the Colorado Company had not yet built to Forest Park, and upon this opinion an order (Rec. 153-154) of further reference was made, with a direction to the receivers, the Wabash Company and the mortgage trustees to file answers to the intervening petition. Thereupon intervenor filed (Rec. 154-161) an amended intervening petition. This was answered (Rec. 161-177), the Wabash Company among other things claiming that the tripartite agreement only gave the right to use the part of the right of way owned by the County Company, and that the Wabash Company had by purchase and condemnation acquired a completed right of way, *the additional part of which was not subject to the agreement.* A replication was filed (Rec. 177). Additional testimony was taken (Rec. 178-203) and the Master made an additional report (Rec. 203-

225) confirming that which he had theretofore reported. The Master's first report (Rec. 140-145) set out that the testimony on the first hearing showed that the Colorado Company, seeking to pay as little as possible, asked that the compensation be fixed upon a valuation of the right of way and tracks, whereas the Wabash Company, seeking to obtain as much compensation as possible, claimed that the *entire* road and *terminal facilities between* the Park and 18th street should be included. After reviewing the testimony offered by intervenor, he found the valuation contended for by it too low, and fixed a larger valuation, because (Rec. 142-143) as the Wabash officials contended, that the valuation should be fixed upon the basis of the value of "the real estate tracks, *the side tracks laid thereon and other appurtenances for doing business,* * * * * * * * * * * * * that the reason the *whole* property should be taken in the value is that you cannot do business without the sidings, switches, etc., *for the purpose of storing, loading and unloading cars.*" It is therefore certain that the Master fixed the valuation by including every right and *facility* between said points belonging to the Wabash Company. Upon a further reference, additional testimony (Rec. 178-203) was taken as to the value of the property, and the Master reiterated his finding (Rec. 224) that the value must, in accordance with the *then* contention of the Wabash Company, "include the superstructure or *terminal* facilities occupied by the Wabash, which the testimony of Mr. Talmage (its General Manager) shows would necessarily be used if the intervenor had the right to use the Wabash tracks." Exceptions to the report were filed by the Wabash Company (Nos. XI and XII, Rec. 225-234) in which the Wabash representa-

tives made no point as to compensation except that the valuation was not high enough and that the value of the use should be divided equally between the two companies. The first subdivision of Exception XI (Rec. 232) asserted that the property was to be valued "for railroad purposes," and by the fourth subdivision (Rec. 233) the claim was made that the *measure* of compensation *"as fixed by the Wabash officials was"* proper, equitable and just, while the third subdivision of Exception XII (Rec. 233) asserted that the testimony of defendant's experts should not be considered, because the same was limited "to the value of said right of way *for other than railroad purposes.*"

Upon these exceptions, Mr. Justice, then Circuit Judge, Brewer delivered an opinion (29 Fed. Rep. 546, 559, Rec. 296-311) in which he sustained the Master's report, with the exception that he charged intervenor with one-half of the value of the use, instead of its proportion in accordance with its wheelage, *because intervenor obtained the equal right with the Wabash Company of the entire right of way, including access to the various industries along the line, and became an equal competitor on equal terms for their business.* He therefore entered a decree (Rec. 4-7; 292-296) giving intervenor, upon the compensation fixed, "the equal use and benefit of said right of way, tracks, switches, *side tracks*, turnouts, turntables and *other terminal facilities*" of said Wabash Company between said points. From the decree the Wabash representatives appealed (Rec. 25), and here contended (138 U. S., 1, 25, 29, Rec. 29) that the court below erred "in making a decree broader than the contract, in that the *County* company only agreed, at most, to permit other companies to use *its* right of

way, while the decree gives the right to use the right of way and tracks, side-tracks, switches, turnouts, turntables and *other terminal facilities of the Wabash Company.*"

The Supreme Court affirmed the decree (id. 51) not only denying (138 U. S., 1, 44-46) the contention, but also (id., 47-48) holding that the prayer was for all that was necessary to secure a *practical* specific performance, and that the Circuit Court having adopted the rate of compensation insisted upon by appellants, and the Colorado Company not having taken an appeal, the question of the rate of compensation was concluded between the parties.

(13) Opinion of the Court Below.

(a) The opinion of Judge Rogers upon the first trial (144 Fed. 476) seems to have been based upon the idea that the contract upon which the "Old Decree" was founded only gave the right to the Colorado Company to use the portion of the right of way which had been acquired by the terms of the tripartite agreement from the County Company, assumed to be 28 to 30 feet wide and continuous from the Park to 18th street.

The opinion was based upon the erroneous assumption that the *entire* right of way covered by the "Old Decree" was obtained by the tripartite agreement, whereas, the only part thereof obtained by virtue thereof, was a 42 foot right in the Park, and a strip 28 to 30 feet wide off of some detached lots owned by the County Company between the Park and 18th Street. Such were the stipu-85,-86, 196-197 302-303) the averment of answer (Rec. 175) therein, the report of the Master (Rec. 137) and the opinions of Mr. Justice Brewer (Rec. 306), and Mr. Justice Blatchford 138 U. S. 1, 7, 11.

Judge Sanborn (152 Fed. Rep. 849, 852, 854; Rec. 606-608) with the concurrence of all the judges, put this beyond question, expressly deciding that there was no limitation in the width of the right of way, and that it made no difference how, when, or from whom it was acquired, for the covenant enforced by the "Old Decree" charged the *entire* right of way of the Wabash Company between the points designated.

(b) When, however, Judge Sanborn reached the close of his opinion, he held (152 Fed. Rep. 849, 863; Rec. 619) that the "Old Decree" did not reach or cover any part of any industrial track or terminal facility not on the particular and specified strip of land known as the right of way of the Wabash Company. From this conclusion, Judge Hook dissented (152 Fed. Rep. 849, 863, 864; Rec. 620, 621). As this difference between the two judges is the question to be here decided, we leave until the argument the quotations from their respective opinions.

(14) Proceedings in the Circuit Court after Reversal By the Circuit Court of Appeals Including The Entry Of The Decree From Which This Appeal Is Prosecuted.

When the mandate (Rec. 593-595) reached the Circuit Court, appellant, as already shown, by leave of court and "by *consent* of parties" (Rec. 597), filed an amendment to its petition setting up the action aforesaid, the mandate of the Circuit Court of Appeals and averring that neither the Circuit Court of Appeals nor the Circuit Court had any right to exclude it from the use of the parts of the industrial tracks of the Wabash Company beyond the limits of the land owned by it, and

to enter a decree so doing would fail to give full faith and credit to that entered by Mr. Justice Brewer and the mandate of affirmance from this court, all contrary to sections 1 and 2 of article III and article IV of the Constitution of the United States, it having been said in Embry v. Palmer, 107 U. S. 9, 27 L. Ed. 346, 349, that these sections required to be accorded to a decree of a federal court, the same full faith which must be given under section 1, article IV, to one of the state courts.

The circuit court, by Judge Rogers, then entered a new decree (Rec. 625, 626) giving appellant the use of all the property upon the particular strip of land, commonly called the right of way of the Wabash Company, between Forest Park and 18th street, but excluding it from the use of its industrial tracks between said points, not actually upon such strip, holding that if the industrial tracks were between such points and owned and used by the Wabash Company, yet not located upon that particular strip, they were not then within the benefit of the decree, even though adjacent to, connected therewith, and part of the terminals located thereon. The decree (Rec. 625) so entered (the italicized words being the subject of the present complaint) reads:

> "The decree of December 31st, 1886 set out in the intervenor's application and motion, is in full force and effect, and is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant Wabash Railroad Company, its successors and assigns. The said Wabash Railroad Company, its officers, agents and employes, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and

assigns, upon the terms fixed in said decree, the enjoyment of the joint and equal use of the entire strip of land between the east line of Forest Park and Eighteenth Street in St. Louis, Missouri, which the predecessor of the Wabash Railroad Company owned or had acquired the right to use when the said decree of December 31, 1886, was rendered, and of the tracks, side-tracks, turn-outs, turntables and terminal facilities now thereon, *but is not entitled to the use, under that decree, of any of the property, industrial, or railway facilities of the Wabash Railroad Company, beyond the limits of that strip* and said Wabash Railroad Company, its officers, agents and employes are enjoined from refusing to permit such use under the terms of said decree by said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns."

It is from this decree this appeal (Rec. 626) is prosecuted.

Specifications of Errors Relied Upon.

The errors assigned (Rec. 627), upon which appellants rely, specify that the court below erred in each of the following respects:

1. In rendering the decree of December 20th, 1907, for that the same was contrary to the law and contrary to the evidence in the case.

2. In rendering and entering that portion of said decree providing, "But it is not entitled to the use, under that decree of any of the property, industrial or railway facilities of the Wabash Railroad Company, beyond the limits of that strip."

3. In rendering and entering the said decree and particularly each portion thereof herein complained of, the Court failed to give full faith and credit to the decree of December 31st, 1886, and its affirmance to which appellant was entitled, under and by virtue of the following provisions of the constitution of the United States:—Section 8, Article I; Sections 1 and 2 of Article III; Section 1 of Article V and Article VI.

ARGUMENT.

I.

THE LANGUAGE OF THE OLD DECREE, AND THE DIFFERENCE IN OPINIONS BELOW IN REFERENCE THERETO.

So far as general language could give it, the "old decree" (Rec. 4, 5) covers all the property of the Wabash Company between certain points by thus describing it:

> "The right of way and tracks, side-tracks, switches, turn-outs, turntables and *other terminal facilities* of said Wabash, St. Louis & Pacific Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis."

The opinion of Judge Sanborn in the Circuit Court of Appeals (Rec. 606, 152 Fed. Rep., 849, 852) exhaustively discussed this question in dealing with that part of the decree of the Circuit Court (144 Fed. Rep. 476) which limited the intervenor's use to a 30-foot strip of the right of way. He, among other things, said:

> "To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel, the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and Eighteenth street. Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and, when the terms of a decree are plain and clear, their ordinary meaning and effect may not be law-

fully contracted or extended, unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore, assumed no light burden when it essayed to prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only 30 feet in width out of the wider strip the Wabash Company owned between the east line of the park and Eighteenth street."

When, however, Judge Sanborn reached the close of his opinion (152 Fed. Rep., 863, Rec. 619) in excluding intervenor from the use of the industrial tracks, he simply said:

> "The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side-tracks, turn-outs, turntables, and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial, or railway facilities of the Wabash Company beyond the limits of that strip. *Union Pacific R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 171, 26 Sup. Ct., 19, 50 L. Ed., 134."

No reason was given for this restriction other than that the learned judge regarded as controlling the decision of this court in *U. P. R. Co.*, v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 160, 50 L. Ed., 134. Judge Rogers, in the decree (Rec. 625) from which this appeal is prosecuted, excluded appellant from the use "of any of the property, industrial or railway facilities, of the

Wabash Railroad Company beyond the limits of that strip" thus allowing the use of the industrial tracks until they reached an imaginary line which was the boundary of the strip. When that *imaginary* line was reached the right to the use ceased. As the industry was beyond that line the result was exclusion from the industry.

Judge Hook, in dissenting from this view (152 Fed. Rep., 863, 864, Rec. 620, 621) not only pointedly showed the error thereof, but also that the case relied upon had no bearing whatsoever upon the question. His language was:

> "I concur in the reversal of the decree of the trial court, and also for the most part in what is said in the foregoing opinion. I do not, however, concur in the exclusion of the industrial tracks from the operation of the decree of 1886. These tracks are the usual and necessary features of railway terminals in a large city, and are as much a part thereof as the limbs are of a tree. They go with the right of way as appendages thereto, and are always so regarded. Their use is essential to the enjoyment of the rights awarded. In my opinion they are clearly within the spirit of the decree of 1886, and also by fair construction within its letter. The decree granted to the intervenor the 'right of way, tracks, switches, side-tracks, turn-outs, turntables, and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth Street in the city of St. Louis.' This is very broad language and it was repeatedly employed in the decree. That Judge Brewer intended to include such industrial tracks as were in existence when the decree was made also seems plain from his opinion (29 Fed., 559). The cost of their construction was included in the total cost upon

which the percentage compensation to be paid by the intervenor was based. Moreover, the consistent course of conduct of the parties for 13 years following the decree shows that they regarded them as being a part of the property the joint use of which was granted to the intervenor. I am unable to see any persuasive reason for excepting them from the comprehensive enumeration of terminal facilities in the decree. That they extend beyond the side lines of the strip of land owned by the Wabash Company and upon the land of others seems to me to be a circumstance wholly immaterial, and yet it must be the circumstance upon which their exclusion from the decree is made to depend. The Wabash Company owns these industrial tracks and operates them as part of its right of way and terminal facilities. Of what importance is it that they are in part upon public highways and the land of others under license instead of being wholly upon land owned by that company? If the latter condition existed, it would doubtless be conceded that they fell within the decree. The scope of the decree is, therefore, determined not by the character of the tracks and their relation to the right of way and terminal facilities as a whole with which the court was dealing but by the character of the title of the Wabash Company to the ground upon which the tracks are laid. It seems to me there has been a narrowing of the decree in this particular.

The case of the *Union Pacific Company* v. *Mason City Company*, 199 U. S., 160, 171, 26 Sup. Ct., 19, 50 L. Ed., 134, is not an authority for this construction of the decree. The court was there considering a claim of the Mason City Company for the use of the Union Pacific bridge across the Missouri River at Omaha, and its approaches. Naturally this would not include industrial tracks and switches. Indeed, when rightly regarded, the decision of the Supreme Court makes for a conclusion

contrary to that reached by my associates. An act of Congress conferring in the most general terms upon other railroad companies the right to cross the bridge at Omaha was held to give the Mason City Company the right not only to cross the bridge, but to use several miles of main and passing tracks of the Union Pacific in the cities of Omaha and South Omaha. The decision well serves to illustrate the liberality with which provisions of the kind we are now discussing are construed when public interests are involved. Of course, the right to use industrial tracks laid since the decree of 1886 was rendered would require consideration of the subject of compensation. The compensation specified in the decree does not include them.

There are also some other observations near the close of the foregoing opinion which I think are not necessary to the consideration of the case. They relate to conditions which it is conceded do not exist at present and which may never arise in the future. I do not wish to express or concur in any view concerning them until they arise and are presented for judgment in the usual way."

The "Old Decree" gave the use of *all* "terminal facilities" between given points. The industrial tracks were *partly* on the strip called the right of way, and *continued* therefrom to adjoining and adjacent industries, giving them their *only* railroad connection. To and upon these tracks the switch engines of the Wabash Company were at all times running. No one could know when the track crossed the particular strip and reached the land of the industry. This was a "terminal facility," as plainly as words can describe it. Since the "Old Decree" gave the use of *all* "terminal facilities," it necessarily gave the use of such industrial

tracks, for as Judge Sanborn said (152 Fed. Rep. 849, 852; Rec. 606) thereof:

> "Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and, when the terms of a decree are plain and clear, their ordinary meaning and effect may not be lawfully contracted or extended, unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention."

If these words did not aptly describe the situation, all doubts would be dissipated by a close study of the terms of the original contract, the facts leading up to the entry of the "Old Decree" and the record upon which it was based. To this phase of the case we now turn.

II.

UNDER THE CONTRACT UPON WHICH THE "OLD DECREE" WAS ENTERED, THE COLORADO COMPANY WAS ENTITLED TO THE EQUAL USE OF THE TERMINAL FACILITIES OF THE WABASH COMPANY.

(1). Origin of the Right.

We have already in our statement outlined the origin of the right upon which was based the "Old Decree". The County Company owned certain separate and detached lots between the Park and 18th street, strips from which were acquired by the Kansas City Company. These, as expressly stipulated (Rec. 50, 51, 86) were shown in blue on Chart A (Rec. 591). After the execution of the tripartite agreement "the Kansas City Company acquired from divers parties the necessary

additional right of way between the Park and the Union Depot," (138 U. S. 1, 11, 34 L. Ed. 843, 152 Fed. Rep. 849, 853, Rec. 607), all of which was shown (Rec. 50, 51, 85, 86, 196, 197) by Chart A (Rec. 594). This chart not only showed in blue the portion of the property thus acquired from the County Company, but also the entire right of way of the Wabash Company between Forest Park and 18th street, and it was this entire property, the acquisition of the use of which was the subject of the litigation in the Main Case and covered by the decree entered therein. All this clearly appears from the report of the Master (Rec. 136-137), the opinions of Mr. Justice, then Judge Brewer (Rec. 306-307), Mr. Justice Blatchford, (138 U. S. 1, 38-41), and Judge Sanborn (152 Fed. Rep. 849, 852-854; Rec. 606-608).

A few further suggestions will make this plain.

(2) The 9th Paragraph of the Tripartite Agreement.

The tripartite agreement (Rec. 241-246) was between the Park Commissioners as the first, the County Company as the second, and the Kansas City Company as the third party, and contained this (Rec. 243) clause:

> "Said party of the second part (the County Company) shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by such companies."

Judge Rogers upon the first trial (144 Fed. Rep. 476), seized upon the idea that this paragraph alone

gave the Colorado Company the right to the use of the right of way, and conceiving that the County Company had a completed narrow right of way to 18th street, which was, by virtue of the tripartite agreement, vested in the Wabash Company, decided that the decree must be limited thereto because such was the subject of the contract. The majority of the Circuit Court of Appeals (152 Fed. Rep. 849; Rec. 619), rejected this view, but narrowly limited the use to that which was located upon the particular strip of land, the use of which had, at the time of the entry of the "Old Decree," been acquired by the Wabash Company.

(3) THE 12TH PARAGRAPH OF THE TRIPARTITE AGREEMENT.

The Wabash Company in the Main Case (Answer, Rec. 171) contended that paragraph 9 alone referred to the right of way of the County Company and did not affect or bind the Wabash Company particularly as to so much of the right of way as was not by that agreement acquired from the County Company (Master's Report, Rec. 172-173) and as the County Company never completed a right of way to 18th Street, paragraph 9 of the tripartite agreement was ineffective, and in no event of effect as against the property acquired from some other than the County Company. Had paragraph 9 stood alone, this contention would have been hard to answer, but the 12th paragraph (Rec. 244,) provided:

> "And whereas, for the purpose of enabling the party of the third part to reach the Union Depot, of St. Louis, Missouri, an amicable arrangement and agreement for a right-of-way outside of and through said Forest Park has been made and en-

tered into and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements and property belonging to, or vested in, or that may belong to, or vest in the party of the second part, in common, in, upon, and through said park under certain regulations, terms and conditions agreed upon by and between said parties therein. And, whereas, the party of the third part in further pursuance of said last named agreement, is about to construct, maintain and operate a railroad, in, upon, and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said party, through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements and property in, upon and through said park. Now, therefore, in view of the premises, and as inducements to said party of the *third* part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit the said party of the third part, its successors and assigns, to have, hold, use and enjoy said right of way, in, upon and through said park in common with, and to be held and enjoyed, jointly, with said party of the second part, and its assigns on the terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part, as to improvements except as to building a depot and switch in said park, which the party of the second part is to do itself, or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges and franchises, in, upon and through said park, or from any cause cease to have, maintain

> or enjoy the same, then it is hereby agreed and covenanted that the party of the third part shall not also be excluded from said park, but shall with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property on the terms hereinbefore set forth, continuously and forever."

(4) The 12th Paragraph Bound the Right of Way of the Wabash Company.

The County Company never had a completed right of way to 18th street and never was built thereto, but ceased to have, maintain or enjoy any right through the park so that the Kansas City Company by paragraph 12 became bound to grant to any other company the use of *its* own right of way between the points in question, otherwise there never could have been obtained by the Colorado Company the right to reach the Union Station, because at varions points between the park and 18th street, there were spaces where no right of way ever was owned by the County Company. That the 12th paragraph bound the right of way of the Wabash Company regardless of how, when, or from whom, it was obtained, was distinctly reported by the Master (Rec. 137-138), decided by Mr. Justice, then Judge, Brewer (Rec. 306-307) and distinctly passed upon by the supreme court (*Joy* v. *St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 853). The Master (Rec. 137-138) upon this subject said:

> "Although the right of way conveyed by the St. Louis County Railroad through the park and to Eighteenth Street was not continuous, but in separate parcels, it was contemplated by all of the

parties that the intervening ground would be obtained by the railroads and constitute a continuous right of way for railroad purposes, and all of the covenants of the contracts and deed were made with that understanding and really to effectuate that purpose, and the contracts and deed are so interlaced with each other as to require the consideration of all of them in the construction of any. Such being the case, the Master is of the opinion that the right of way from the north line of the park into the Union Depot must be considered as the subject matter under consideration by the parties and ought to be treated as one whole."

Mr. Justice Brewer (Rec. 306-307) said:

"It is argued with great force, however, by counsel for the respondents, that even if the purchasers were charged with notice of these terms and conditions, as attaching to the lands described in the deed, *inasmuch as the Kansas Road obtained a large portion of its right of way between Forest Park and the Union Depot from other sources, it took these latter portions free from any burden cast upon the lands specifically conveyed by the County Road.* 'Can it be,' he says 'that a condition in a deed, of a few feet of the right-of-way, in a long line of three hundred miles, casts a burden on the entire line, to be assumed by every succeeding purchaser?' I might answer this extreme case by a reverse question: Can it be possible, that a condition attached to substantially the entire right-of-way of this long line of road, can be defeated by the fact that some few feet have been acquired by a deed free from such condition? But these extreme cases do not constitute the practical matter before us. Here the County Road had an incomplete right-of-way through the park and to the Union Depot. A share of this incomplete

right-of-way it conveyed to the Kansas Road, subject to certain conditions. Can it be that the completion by the Kansas Road of this right-of-way, by purchase of intervening and isolated tracts, destroys the entire value of the conditions? Looking at this matter in a practical way and from a reasonable standpoint, I think the answer to this question must be in the negative."

Mr. Justice Blatchford (138 U. S. 1, 33, 38 L. Ed. 843, 853) said:

"It appears from paragraph 12, that the Kansas City Company had in view the failure of the County Companyto comply with the provisions of paragraphs 1 to 8 inclusive of the tripartite agreement, relating to the construction of the road, among which was the provision which required the completion of the road within one year, under the penalty of the forfeiture of all rights under the agreement. The Kansas City Company guarded against such contingency by the provision, in paragraph 12, that, in case the County Company, its successors or assigns, should forfeit its rights, privileges and franchises in, upon and through the park, or from any cause should cease to have, maintain or enjoy the same, then the Kansas City Company should not also be excluded from the park, but, with its successors and assigns, should continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements, and property, on the terms thereinbefore set forth, continuously and forever. Thereby in case of the forfeiture of its rights by the County Company, the Kansas City Company became possessed of the entire right of way, subject to the terms of the agreement of August 11, 1875, between the two companies, and to those of the tripartite agreement of the same date; and that which, prior to the forfeiture, was held and enjoyed jointly by

the two companies, became the sole property of the Kansas City Company, its successors and assigns, on the terms of the said contract between the two companies, and under the same terms and conditions which were imposed upon the Kansas City Company. Among the conditions so imposed were those of paragraph 9 of the tripartite agreement."

These views were emphasized and enforced by Judge Sanborn (152 Fed. Rep. 849, 852-854; Rec. 606-608).

(5) THE COVENANTS IN PARAGRAPHS 9 AND 12 WERE FOR THE BENEFIT OF THE PUBLIC, AND ARE TO BE LIBERALLY CONSTRUED.

Having thus seen that there was the right to use the right of way of the Wabash Company, no matter from whom, when, or how, or by what title, acquired, it remains to be seen whether such use should, as decided below be limited to such facilities as the Wabash Company actually had located upon a specified strip of land actually *owned* or the use of which had been acquired by it, or whether a fair construction would include facilities immediately connected and used therewith, like short industrial tracks having no other railroad connection and *parts* of which were actually upon the strip. In determining this question it should be borne in mind that the right of way of the Kansas City Company, regardless of how or from whom acquired, or by what technical legal title, was, by virtue of paragraph 12, charged with the burden of permitting other companies to use it. It follows that the Colorado Company was no interloper, but availed itself of a provision in the tripartite agreement made *for the benefit of the public*, which therefore requires a liberal construction. Mr. Justice Blatchford repeatedly emphasized

(*Joy* v. *St. Louis*, 138 U. S. 1, 38, 40, 43, 47, 50, 51, 34 L. Ed. 843) this view:

> "The covenant in paragraph 9 of the tripartite agreement created an easement in the property of the County Company and the Kansas City Company for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might wish to use not only the right of way through the park but also that between the park and the Union Depot. * * * Contracts of such a character are to be construed liberally in favor of the public when the subject matter concerns the interests of the public. * * * It would be inequitable to permit the Kansas City Company, or its successors, to continue to use the right-of-way through the park and at the same time to deprive the Park Commissioners, or their successors, the city of St. Louis, as trustees of the public, of the benefit of the use by other railroad companies of the right of way between the park and the Union Depot. * * * In case the County Company should forfeit its rights in the park, the Kansas City Company was to continue to enjoy the right-of-way on the terms imposed on the County Company by paragraph 9 of the tripartite agreement. Such construction of the contract is the only one consistent with fair dealing and the manifest intention of the parties. The tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way. The grant of the right to other railroads to use such right of way through the park and to the Union Depot was a grant to the Park Commissioners, as trustees for the public, and is to be construed liberally. Paragraph 9 is imperative. It provides that the County Company 'shall permit' other railroads to use its right-of-

way. * * * *Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the Court.* * * * *The rights of the public in respect to these great highways of communication should be fostered by the courts*; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the *development of the interests of the public* in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. * * * The city of St. Louis is, in the present case, not merely a nominal party, but is charged with the duty of protecting the park, and of preserving and *fostering the commerce of the city.* Both of these objects are clearly set forth in the tripartite agreement executed by the Park Commissioners, of whom the city of St. Louis is the successor, and the considerations thus arising are legitimate ones in a court of equity, the case being founded upon the tripartite agreement. * * * Under the tripartite agreement, the right-of-way through the park was obtained by the Kansas City Company, and in consideration of the covenants contained in paragraph 9 and other paragraphs of that agreement, $40,000 were expended by the Park Commissioners in aid of the construction of the railroad through the park, upon the right of way granted. Things were to be done by each party, for valuable consideration to be paid by one to the other. The Park Commissioners complied in all respects with the agreement. Although the one easement was granted in consideration of the other, the appellants refused to permit the enjoyment of the easement which they granted. The want of mutuality is urged when the appellants

are called upon to comply with the covenant *which is valuable to the city of St. Louis and the public whom that city represents.*"

An interested public looking to competition and direct connection with distant cities would find little comfort in such a conflict if a new company using the main tracks of a railroad (under a contract made by it for both), was denied connection with the industries and industrial tracks adjacent to and connected with, and already part of the old line.

(6.) THE RIGHT OF WAY INCLUDED ALL TERMINAL FACILITIES.

The convenant was for the use of the right of way, and this included all terminal facilities, no matter how much land the Wabash owned. The original contract (Rec. 243, 244, par. 9, 12) enforced by the decree (Rec. 4-7; 292-296) gave the Colorado Company the right to the use of the *right of way* of the Wabash Company, no matter how, by what title, or when acquired. The term "right of way" means more than the mere right of passage; more than the mere space for the main tracks; more than the strip of land actually owned. It includes the right to all terminal facilities. Mr. Justice Brewer (Rec. 305, 306) was of that opinion, as was Mr. Justice Blatchford (138 U. S. 1, 44-46, 34 L. Ed. 843). The construction of the words "right of way" was before the court in *Territory of New Mexico* v. *United States Trust Company*, 172 U. S. 171, 43 L. Ed. 407, where it was decided that the term not only included the main tracks, but all the necessary station buildings, work shops, depots, machine shops, switches, sidetracks, turntables and water stations, the opinion in *Joy* v. *St. Louis*, 138 U. S. 1, 34

L. Ed. 843, being one of the leading authorities relied upon. This case was followed and the same doctrine announced in *Territory of New Mexico* v. *United States Trust Co.*, 174 U. S. 545, 43 L. Ed. 1079.

In C. & A. R. Co. v. People, 98 Ill. 850, 856, it was said:

> "We can see no reason why the term 'right of way' should be confined to the land over which the main track of a railroad should be constructed. The land upon which a side-track, a switch or a turnout is built and in actual use by the company in the business for which it was organized, for all practical purposes is as much held for right of way as is the land upon which the main track is constructed. In the operation of a railroad it is necessary that trains should pass each other, and hence the necessity of turnouts, switches and side tracks. In the loading of cars, the making up of trains, and in innumerable other instances that might be named, in the prosecution of its business as a common carrier, side-tracks, switches, and turnouts are as indispensable to a proper transaction of its business as the main track itself. We are, therefore, of the opinion that the land held and in actual use by a railroad company for side-tracks, switches and turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers, alike with the land upon which the main track is constructed; and upon what principle the land upon which the main track is laid can be held to be a right of way, and the land over which a side-track, switch or turnout passes can be termed something else, we are at a loss to understand."

So in *Lake Erie & W. R. Co.* v. *Middlecoff*, 150 Ill. 27, 37 N. E. Rep. 660, 663, it was decided:

"The right of way of a railroad company over and upon the street in a city includes all that part of the street held and in actual use by such railroad company for its main track, side-tracks, switches, turnouts, that is in any wise connected with its main track, and used by such railroad company for loading and unloading cars, or for storing cars."

In *Plafi* v. *Terre Haute & I. R. Co.*, 108 Ind. 144, 148, 9 N. E. Rep. 93, 95, it was said:

"The term 'right of way' is not limited by any statutory definition, nor by any statutory provision to a strip of land of any particular and definite width at all points on the line of the railroad. As applied to a railroad company, it means a way over which the company has the right to pass in the operation of its trains. Williams v. Railroad Co., 50 Wis. 76, S. C. 5 N. W. Rep. 482. A railroad cannot be operated with anything like success with a single track. It is necessary to have either a double track, or turnouts and sidetracks, in order that trains going in opposite directions may pass. It is just as necessary that there shall be turnouts and side tracks for the making up of trains, the changing of engines, the replenishing of them with water and fuel, and the loading and unloading of freight. With many of the important lines, it is often necessary to have many of such turnouts and side-tracks, in order that the business may be done with dispatch, in obedience to the demands of commerce and traffic. These side-tracks, such as are required at commercial centers and the larger cities and towns, could not be crowded upon a narrow strip of land, such as may be sufficient between stations. In order that the company may have the requisite amount of side-tracks at such points, it is necessary that it shall have a right of way over a sufficient amount of land upon which to lay and operate them. This right of way the company may

> acquire by condemnation proceedings if necessary. Rev. St. 1881, Sec. 3907. When such right of way is acquired, by whatever means, the land thus acquired becomes a part of the company's right of way, * * * as much as that portion occupied by the track."

Judge Sanborn recognized the force of these cases by (162 Fed. Rep. 849, 852; Rec. 605-606) saying:

> "The ordinary signification of the term 'right of way', when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located."

He, however, failed to apply this rule to the industrial tracks which the Wabash Company had constructed, in some instances paying for the material, and which it was "entitled to use."

From these authorities it is clear that the right of way which the Colorado Company is entitled to use is the entire property of the Wabash Company between the north line of Forest Park and 18th Street, including its facilities. The right to use is as broad as the necessities of a railroad. The word "use" is not new to the law books. In the civil law a use is defined as "the right which a person has to use or enjoy the property of another according to his necessities." (*Mulford* v. *LeFranc*, 26 Cal. 88.)

In *Brunson* v. *Marton*, 152 Ind. 111, 118, 52 N. E. Rep. 599, 601, 602, it was said:

> "As a general rule, the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. See Anderson's Dictionary of Law, p. 1069. If the thing to be used is in the form or shape of real estate, the use thereof is its occupation or cultivation, etc., or the rent which can be obtained for its use."

In *Snow* v. *Columbian Ins. Co.*, 48 N. Y. 624, it was said:

> "'To use' means to employ, to hold, to occupy, to enjoy, or to take the benefit of, as a chair, a book, or possess a harbor. In connection with the word 'port' it means to go into a harbor or haven for shelter, for commerce, or for pleasure, and to derive a benefit or advantage from its protection."

It follows, therefore, that the use of the right of way was not limited to the use of a specific strip of land acquired for railroad purposes, but included the right to the terminal facilities adjacent thereto and connected therewith, especially as they were either built by or under contract with it, for its use with and as part of its railroad and parts of them were actually upon that specific strip.

No appeal was prosecuted by the Wabash Company, so it is concluded by everything decided against it. It is familiar law that there can be, in the absence of a cross appeal, no modification of a decree in favor of an appellee.

In *Chittenden* v. *Brewster*, 2 Wall. 191 17 L. Ed. 839, 841, Mr. Justice Nelson said:

> "But here the complainants only have appealed, and the rule is settled in the appellate court,

that a party not appealing cannot take advantage of an error in the decree committed against himself, and also, that the party appealing cannot allege error in the decree against the party not appealing. *Kelsey* v. *Western*, 2 N. Y. 505; *Norbury* v. *Meade*, 2 Bligh, 261; *Mapes* v. *Coffin*, 5 Paige, 296; *Idley* v. *Bowen*, 11 Wend. 227. If the appellees desired to avail themselves of this error in the decree, they should have brought a cross appeal. By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing."

The same rule was announced in the main case (138 U. S. 1, 47, 48) 34 L. Ed. 843 thus:

"The Circuit Court having adopted the rate of compensation insisted upon by the appellants, and the Colorado Company not having taken an appeal, the question of the rate of compensation is concluded between the parties."

The only point therefore for this Court is whether the Colorado Company should have been excluded from the use of those parts of the industrial tracks which were not actually upon the particular strip of land commonly called the right of way.

(7) IF THE PROVISIONS OF THE ORIGINAL TRIPARTITE AGREEMENT WERE NOW BEING ENFORCED, THE CONSTRUCTION OF THE PARTIES AS TO THEIR RIGHTS WOULD BE CONCLUSIVE.

We have already shown that for over sixteen years rent, taxes and repairs were charged and paid upon the basis that there was the right to the *entire use* of the *entire* right of way and *terminal* facilities, without any limitations as to the width or character thereof. Be-

sides a large rental was, as hereinafter shown, obtained by claiming a valuation of the entire property as a whole railroad proposition. Such being the construction of the parties to an *executory* contract, a court should adopt it as conclusive.

In *Chicago* v. *Sheldon*, 9 Wall. 50, 54, 19 L. Ed. 594, 596, 597, Mr. Justice Nelson said:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

In *Topliffe* v. *Topliffe*, 122 U. S. 121, 30 L. Ed. 1110, 1114, Mr. Justice Matthews said:

> "The operations of the parties in the manufacture and sale of the article were carried on, and continued to enlarge and prosper, and became profitable; and the parties throughout acted upon the assumption and understanding that the article thus manufactured was the article contemplated by the contract between them. If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period."

Central Trust Co. v. *Wabash, etc. R. Co.*, 34 Fed. 254, 255, 256, 257, 258 involved a construction of the contract to use this same right of way. Judge Thayer said:

> "The fact that the St. Louis, Kansas City & Northern Railroad and its successors, while acting under the contract, paid mileage on all the intervenor's freight, baggage, and passenger cars until June, 1885, and that mileage was thereafter paid by the receivers on freight cars, creates a strong presumption that the payment of such mileage was within the contemplation of the parties who made the contract, and that, as they construed it, the contract required the payment of such mileage, either by reason of some provisions of the agreement, or because of some usage applicable to the subject-matter of the contract, in the light of which they supposed that the contract ought to be, and would be, interpreted. The agreement being executory, the practical construction adopted by the parties thereto, and by their successors, during a period of several years, is entitled to great, if not controlling, influence in determining what is the proper interpretation of the same, as was held in *Topliff* v. *Topliff*, 122 U. S. 121, 7 Sup. Ct. Rep. 1057, and *Chicago* v. *Sheldon*, 9 Wall. 54. It is well understood that the practical construction of a contract adopted by the parties thereto will not control or override language that is so plain as to admit of no controversy as to its meaning. In all such cases the intent of the parties must be determined by the language employed rather than by their acts, but if the language employed is of doubtful import, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, then beyond all question it

is proper to consider how the parties have construed the instrument with respect to such debatable points. If both parties to an agreement for a considerable period, and while free to act, treat a contract as imposing certain duties or obligations, such conduct ought to settle the construction of the instrument if its provisions with reference to such matters are to any extent uncertain, obscure, or incomplete. 'A construction of a contract adopted and acted upon by both parties, will be regarded as worked into the contract', says Dr. Wharton in his work on Contracts, vol. 1, §206, if such construction does not conflict with its express provisions. The manner in which a construction of a contract adopted and acted upon by both parties may, so to speak, be worked into a contract, is well illustrated in *Topliff* v. *Topliff*, above cited, and also in the case of *Robinson* v. *U. S.*, 13 Wall, 363. In the latter case Robinson had contracted to deliver a certain quantity of barley, but whether the delivery should be made in bulk or in sacks was not specified. For a period of six months the barley was delivered in sacks. The court refers to this fact as a proper reason for construing the contract as requiring a delivery in sacks, rather than in bulk. It will rarely be found we apprehend, that a court will go far astray in arriving at the actual intent of the parties to a contract (which, after all, is the purpose of all rules of construction) by adopting that interpretation which the parties, without compulsion, have themselves adopted and acted upon. * * *We refer to the controversy between counsel as to the proper interpretation of the contract, not with a view of deciding which interpretation ought to prevail if the question was *res integra*, but as evidence of the fact that the contract considered by itself is fairly susceptible of different interpretations, because it does not in terms provide how cars shall be obtained or supplied for the use of

the joint line. Such being the case, and a controversy having now arisen as to the construction of the agreement, we have no doubt that we are authorized to settle the controversy by adopting that construction which the parties themselves adopted and acted upon invariably for a series of years."

In *Long-Bell Lumber Co.* v. *Stump*, 86 Fed. Rep. 574, 578, 579, 30 C. C. A., 260, Judge Philips said:

"There is no better established rule, or one more instinct with the spirit of equity, in the construction of contracts wanting in perspicuity or clearness of meaning, than to adopt that which the parties, by their course of dealing, placed upon it before any controversy arose between them. 'In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when differences have become serious, and beyond amicable adjustment, it can be settled only by arbitrament of law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one.' *Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Topliff* v. *Topliff*, 122 U. S. 131, 7 Sup. Ct. 1057. 'Courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties.' *Thomas* v. *Railway Co.*, 81 Fed. 919; *Sanders* v. *Munson*, 20 C. C. A. 581, 74 Fed. 651."

In *Ill. Trust & Saving Bank* v. *Arkansas City*, 22 C. C. A. 271, 76 Fed. Rep. 271, 292, Judge Sanborn said:

> "These parties construed this contract themselves before any controversy arose over it. One party constructed, and the other accepted, under the contract, pipes and hydrants, which could not stand the test of section 9 of the ordinance. They thereby themselves held that such test had no relevancy to the extended pipes and additional hydrants, and their view was undoubtedly right. 'In an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.' *City of Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Topliff* v. *Topliff*, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 1062; *Leavitt* v. *Investment Co.*, 12 U. S. App. 193, 4 C. C. A. 425, and 54 Fed. 439, 444."

In *Thomas v. R. Co.*, 81 Fed. Rep. 911, 919, Judge Taft said:

> "It is well settled that, where the construction of a contract is doubtful, courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties."

In *New Orleans, etc. R. R. Co.* v. *Meridian Water Works Co.*, 18 C. C. A., 519, 72 Fed. Rep. 227, 232, Judge Boarman said:

> "If the terms of the contract are ambiguous or indefinite, and hence of doubtful character, the particular construction by the parties themselves is entitled to great if not controlling, influence."

In *Mct. Nat. Bank* v. *Benedict Co.*, 20 C. C. A. 377, 74 Fed. Rep. 182, 185, Judge Caldwell said:

> "But, if its meaning was doubtful, the fact that the parties to it understood it to be a contract of bailment, and acted upon that assumption, would remove the doubt. * * * * Moreover, parties have the undoubted right to make their own contracts, and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court 'leaves the parties to be governed by their understanding of their owa language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice.'"

In *Fox Solid Pressed Steel Co.* v. *Schoen*, 77 Fed. Rep. 29, 30, Judge Acheson said:

> "Moreover, the practical interpretation by the parties of an ambiguous clause of a contract is entitled to great, if not controlling, influence (*Topliff* v. *Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057); and such practical construction, though at variance with the literal meaning of the clause, will prevail (*District of Columbia* v. *Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585)."

In *Sanders* v. *Munson*, 20 C. C. A. 581, 583, 74 Fed. Rep. 649, 651, it was said:

> "Ambiguities in the terms of a contract are often dispelled by the construction which parties themselves have placed upon the terms before controversy has arisen, and courts frequently give effect to this construction, and adopt the meaning which the parties have assumed to be correct."

In *Leete* v. *Pacific Mill & Mining Co.*, 88 Fed. Rep. 957, 967, 968, Judge Hawley said:

"As the references made to this money in the correspondence are to some extent uncertain, indefinite, and doubtful, I am of opinion that the subsequent acts and conduct of both parties, in so far as the same tend to shed light upon the transaction leading up to, and culminating in, the execution of the deed, is admissible in evidence, and should be considered by the court,—not as creating a new contract, but as tending to show what the contract and understanding of the parties were at the time of the delivery of the deed. From the subsequent acts and conduct of the parties, it is made perfectly clear that at the time of the execution of the deed the defendant did not assert any claim to this money."

In *St. Joseph Union Depot Co.* v. *Chicago, etc. R. Co.*, 32 C. C. A. 284, 89 Fed. Rep. 648, 657, Judge Shiras said:

"Thus, it appears that all the railway companies, including the defendant herein, have acquiesced in the practical construction put upon the contracts between the Depot and the Railway Companies by the executive committee in charge of the rebuilding of the depot, to the effect that the erection thereof formed a part of the repairs of the premises, of which the cost was apportionable between the several railway companies; and it is a familiar rule that when the parties, by their own acts, have put a practical construction upon the terms of a contract existing between them, courts will usually adopt and enforce such construction."

In *Lyman* v. *K. C. & A. R. Co.*, 101 Fed. Rep. 636, 641, Judge Philips said:

"No better or safer rule has been established for the construction of a contract than that placed upon it by the conduct and acts of the parties themselves before any controversy arose between them."

In *Fitzgerald* v. *First National Bank*, 52 C. C. A. 276, 114 Fed. Rep. 474, 478, Judge Sanborn said:

> "And the practical interpretation given to their agreements by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent."

Having thus seen that if the Colorado Company were, as an original proposition, asserting its rights under the tripartite agreement, it would not be limited in the use of, nor to the specific strip, but would have the right to use the entire property and its terminal facilities, we turn to the proceeding in the Main Case to see if the question has not already been concluded by what has been there decided, and by the position there assumed by the parties.

III.

THE RIGHT TO USE THE TERMINAL FACILITIES IS RES ADJUDICATA.

(1) Master's Report was, at the Insistence of Wabash Company, Directly Contrary to its Present Contention.

Upon the trial the representatives of the Wabash Company insisted that the value should, without regard to width, include the entire road and all terminal facilities. The Master's reports clearly so show. In the first report (Rec. 140-145) this is made quite plain, in this language, the italics being ours:

> "If the intervenor is entitled to the use of the Wabash right of way and tracks, what would be a fair and equitable compensation for the use there-

of? The order of reference herein requires me to report a sum that would be a fair and equitable compensation for the use of the right of way and tracks of the Wabash, St. Louis & Pacific Railway Company, as prayed for in the bill of complaint. On this question there is such a conflict of testimony as to be almost impossible to arrive at a basis. The complainants' counsel claims that the true measure of compensation is first to *find the cost of the track and right of way in question* and to allow interest on this sum at the rate of six per cent per annum, the legal rate of interest in Missouri, and to add to this the cost of maintenance, and then to divide this sum on a wheelage basis; that is to say, in proportion to the number of cars run by each road over said track; settlements to be made on this basis every thirty days.

On the other hand, *the Receiver's counsel claim* that a fair and equitable compensation is to *value the right of way and tracks* proposed to be used at their present value *as a railroad*, to allow interest on this value at six per cent, and to require the St. Louis, Kansas City & Colorado Railroad to pay one-half of said interest and to pay in addition thereto their proportion of the cost of operating and maintenance of said right of way and tracks on a wheelage basis. In support of their theory the complainants' counsel introduced testimony of S. T. Emerson, the chief engineer who built the St. Louis, Kansas City & Northern Railroad from Ferguson through the park to the Union Depot. He stated that the cost of the *whole* of said branch road was $840,000.00, including the right-of-way and everything, and that that *portion of the road* from Eighteenth Street or the Union Depot to the north line of the park cost $360,000.00 (p. 9). That he had recently examined the track, and that the superstructure, the ties, iron, etc., had greatly depreciated in value and that the depreciation

amounted to about fifty per cent. (p. 13.). That the difference in the value of the track as it is now and its cost in the first instance was about $25,000.00 less on account of the depreciation, and that the superstructure originally cost about $40,000.00. Deducting this depreciation at fifty per cent. $20,000.00, from the original cost, would leave $320,000.00. He also testifies that the cost of maintaining a mile of single track railroad, such as the Wabash, would not exceed $600.00 per mile a year. Taking this basis, four miles and 224 feet, for maintenance per year, would be about $2,400.00 (p. 16). Mr. Emerson has been in the railroad business as an engineer, partly in operation and partly in construction, for 34 or 36 years, and he gives his opinion that a fair and equitable compensation in a case where one railroad has a right under a contract to use the track of another, would be to divide, on a wheelage basis, the interest on the first *cost of the property* and the cost of maintenance (p. 16). With a settlement every thirty days (p. 20). On cross-examination he says (p. 22) that he arrived at the cost of the road by taking the amount of money he had spent in construction, and consulting the Auditor as to the balance of the money that had been expended, but could not detail how much was for right-of-way, and how much for construction. He says (p. 23) that this was the cost of the road up to about July, 1876, and does not include the subsequent cost. On the other hand, Col. How, the general agent of the Receivers of the Wabash, states, that (p. 91) he was connected with the St. Louis, Kansas City and Northern Railroad as Secretary and Vice-President, and that it was his duty to approve vouchers and keep himself posted with respect to the *cost of that railroad* between the Union depot and the north line of the park, and that his recollection is that it cost between $1,000,000.00 and

$1,100,000. That the *whole cost* from Ferguson into the Union Depot was $1,250,000.00, and that a liberal estimate of the cost from the north line of the park to Ferguson would not exceed $250,000.00 (p. 91).

It is also in evidence that subsequent to the original building of this branch, the St. Louis, Kansas City and Northern Railroad and *the Wabash road have acquired other property on which they built side tracks, switches and other things necessary for the operation of their road.* As both these gentlemen are supposed to be in a position to know the cost, and as one limits the cost to about July, 1876, it is possible that the difference arises from the sum spent after that date. In regard to the present *value of the railroad* there is the same conflict of testimony. Col. Talmage, the General Manager of the road for the Receivers, testifies that some time ago at the request of the C. B. & Q. road for an entrance into the city over these tracks, he had his engineer go over the *value and costs of the property* and got up the figures, and went over the same with him, and that he considered the *present value of the property* to be between $1,250,000 and $1,500,000 and he based this *estimate upon the property* having been purchased some time ago, and without improvements with which a similar right-of-way, parallel, would be burdened. He states (p. 77) that he would consider a fair valuation of the right-of-way and superstructure of the Wabash Railroad from the north line of the park to the Union Depot *with such appurtenances* as are necessary to operate it as a railroad in the City of St. Louis, side-tracks, etc., to be worth at least $1,500,000 (p. 77). *He says* (p. 80) *this valuation includes* the property between the west line of the park and Union Depot; that is, *the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for*

doing business. He states (p. 82) *that the reason the whole property should be taken in the value is that you cannot do business without the sidings, switches, etc., for the purpose of storing, loading and unloading cars.* Col. How in his testimony values the line as it stands today, including the right-of-way *and superstructure and necessary appurtenances*, from the north line of the park to the Union Depot at $1,800,000 and that if a new line were to be built it would cost fully $2,500,000 (p. 91). On the other hand the intervenor introduced Julius Pitzman, John Grether and L. B. Jones, who are generally familiar with the values of real estate in the city of St. Louis, who put the value on a strip of ground thirty feet wide as it appears on the plat, Chart A, extending east of Forest Park thirty feet wide to Tayon Avenue (p. 108) at $265,141.00. This is of the real estate alone, simply considered a vacant land, level with the streets, thirty feet wide. These witnesses detailed the manner in which they arrived at this estimate, and said that it does not include anything except the actual value of the land, nor what the railroad might have paid for damage, for adjoining property, nor any of the superstructure, nor improvements thereon. *There was no estimate of value of the railroad as a railroad given by any one except Mr. Talmage and Mr. How.* There is quite a wide divergence between the witnesses for the intervenors and the Receivers as to the method of arriving at an apportionment between the two companies. Col. Emerson states that it should be divided on a wheelage basis solely. J. B. Vandyne, who has been in the railroad business since 1855, and has been General Superintendent since 1861, states that in a case where one road by contract has a right to run over the tracks of another it should be divided on the wheelage basis, taking into consideration the maintenance of the road, the interest on the cost of the

road, and he gives instances (pp. 45 and 46) where this basis is adopted between roads. In answer to a question by the Master (p. 47) he states that an additional element to be considered is the value of the track itself. Charles H. Sharman, who is the Superintendent of the Illinois and St. Louis R. R. in East St. Louis, and who is familiar with instances in which railroads run over the tracks of other roads, after stating instances, states that in his opinion a mode of arriving at a fair and equitable basis would be to take into consideration the value of the tracks to be used jointly, in relation to what it cost, and then agree upon a percentage to be paid on that, and add to that amount the cost of maintenance of the tracks and prorate that. That he would allow six per cent on the cost, and divide the whole on the basis of wheelage (p. 50), and that he knows of no more equitable way of arriving at compensation than the wheelage basis (p. 51). In answer to a question by Judge Hough (p. 57) he states that to some extent the value of the right-of-way at the time the road was to be used by the other road ought to be taken into consideration. On the other hand, Col. Talmage and Col. How who were fully as competent as railroad men as the other witnesses, state that the proper way to ascertain the equitable consideration to be paid by one road for the use of another's tracks is to value the right-of-way and track *and its appurtenances* and to require the entering road to pay one-half the interest per annum on this valuation, and in addition thereto to pay on a wheelage basis the maintaining and operating expenses of the right-of-way track. Both of these gentlemen gave numbers of instances connected with the Wabash property in which this basis has been adopted; sometimes the Wabash paying this consideration and sometimes receiving this consideration from other roads. Considering all the circumstances

surrounding this case, the Master is of the opinion that neither of the bases contended for respectively by the intervenors and receivers is correct. It would be manifestly unjust to permit one road to use the property of another by simply paying interest on the original cost years ago, when the property itself might have increased in value to an enormous extent, and the cost of similar facilities to be purchased or condemned anew for the purpose of the entering road would be increased corresopndingly. The change of circumstances, the increased facilities of business, the connections, the increased business itself, are all factors in the problem. It would be manifestly unjust to require a road using the track one-tenth as much as the other to pay one-half of the fixed charges or interest on the value, especially where the contract provides for the use of the road by even other roads than the Wabash and the intervenor. The intervenor must be considered in this matter not simply as a road twenty-one miles long, but a road running throughout the whole length of its projected route, as good faith requires sooner or later it should be built, and with it would come increased business and use of the track. Endeavoring to extract from the contradictory views and testimony on these points some basis which may be equitable, I think it would be proper to adopt as a basis the present value of the property sought to be used, to allow interest on this sum at the legal rate of interest in the State of Missouri, to-wit: six per cent., to add to this the actual expenses of repairs and maintenance of the right-of-way and tracks and the operating expenses of these tracks, and to divide the whole on a wheelage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, the Wabash road to keep an accurate account of such maintenance and operating expenses, and each road to keep an accurate account of

the number of cars and locomotives run over said tracks by each, and settlement to be made every thirty days between the companies. For the purpose of ascertaining the amount of interest to be paid, I think, from all the testimony, that a fair valuation of the right-of-way and tracks sought to be and necessary to be used should be fixed at $1,000,000. If the Court prefers to fix the operating and maintaining expenses at a given sum, I find from the testimony that $600.00 a mile per annum is a fair estimate of such expenses, which would be $2,400.00 a year, for the property sought to be used. In arriving at this conclusion, I considered the fact that it could only apply temporarily, until the Court can be fully informed as to the value, and as to the equity of the suggested basis of division on the final hearing. This question is practically a question of fact to be decided from all the circumstances of the case as to what would be fair and equitable."

In the second report (Rec. 224) the idea was by the Master thus emphasized:

"On the final hearing additional evidence was offered as to the proper measure of compensation, and also as to the value of the real estate occupied by the railroad from the north line of Forest Park to Eighteenth Street. *The testimony as to the value of the real estate does not include the superstructure or terminal facilities occupied by the Wabash which the testimony of Mr. Talmage shows would be necessarily used if the intervener had the right to use the Wabash tracks.*

After due consideration of this new testimony, I am inclined to think that my original valuation of the track and *right-of-way* sought to be used was equitable and proper under the circumstances."

There can, therefore, be no doubt that the rental fixed by the Master was based upon a valuation of the

entire property with *all its terminal facilities* regardless of width, and that the purpose was to require the Colorado Company to pay for the equal use thereof.

(2) THE EXCEPTIONS OF THE WABASH REPRESENTATIVES CONCEDED THAT THE VALUATION SHOULD INCLUDE THE TERMINAL RIGHTS AND FACILITIES.

The Colorado Company filed no exceptions to the Master's report. The Wabash Company, its receivers and mortgage trustees, however, filed exceptions (Rec. 225-234), the eleventh and twelfth (Rec. 232-234) of which alone referred to the compensation. They read:

"XI.

1st. The Master erred in finding that the *value of defendant's railroad and right-of-way* through the park and up to Eighteenth Street in the city of St. Louis, was only one million dollars; whereas, the evidence of J. F. How and A. A. Talmage shows a cost and value of the same, *for railroad purposes*, to be a million and a half of dollars.

2nd. The Master erred in finding, upon evidence, that an equitable basis of compensation for the use of the defendants' right-of-way *and property* from the north line of Forest Part up to the terminus of said line at Eighteenth Street would be to allow interest on the value of said right-of-way and tracks at the rate of six per cent per annum, and by adding to this the actual expenses of repairs and maintenance of right-of-way and tracks, and the operating expenses of the tracks, and dividing the whole on a mileage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, when the evidence of Messrs. Talmage and How shows the proper and equitable basis of compensation in such cases to be to allow interest at a reasonable rate on the value of the property, to-wit: one million five hundred thousand dollars,

and charging each of the two companies using the property with one-half the amount thereof and then by distributing or dividing the actual expenses of repairs and maintenance of right-of-way and tracks, and the operating expenses of the property, upon a wheelage basis, charging each company with such a proportion of the total expenses for operating, maintaining, improving and repairing said right-of-way, *tracks and property* as the number of its locomotives and cars run over said property may bear to said total expenses.

3d. Because the compensation recommended by the Master is insufficient.

4th. Because the Master erred in refusing to find that the measure of compensation, and mode of ascertaining the same, suggested by defendants, and supported by testimony of How, Talmage and other witnesses, is proper, equitable and just."

"XII.

1st. The Master erred in admitting the testimony of Andrew McKinley as to his construction of the tripartite agreement, and in permitting him to state the purposes he had in view, as President of the Board of Park Commissioners, in making the same.

2nd. The Master erred in admitting the testimony of J. B. Vandine, C. H. Sharman, J. W. Paramore and other witnesses, as to what would, in their opinion be a fair and equitable compensation for the use of defendants' right-of-way through the park, and up to the terminus of the line at the Union Depot in St. Louis, when it was not shown that any of said witnesses were competent or qualified to testify concerning the subject matter.

3d. The Master erred in admitting the testimony of Pitzman, Grether, Jones and others, as to

the value of defendants' right-of-way and property in question for railroad purposes, because it did not appear that said witnesses were qualified to testify concerning the subject matter and because their testimony as to the value of said right-of-way for other than railroad purposes was incompetent and irrelevant.

4th. The Master erred in admitting the agreement made October 29th, 1872, between the Commissioners of Forest Park and the St. Louis County Railroad Company, because the act under which said Commissioners were appointed and acted was unconstitutional and void.

5th. The Master erred in admitting the tripartite agreement in evidence, as it purported to affect an interest in land, and was not acknowledged or proved, as required by statute.

6th. The Master erred in admitting, against respondents' objections, certain immaterial, incompetent and irrelevant testimony.

7th. Because the findings of the Master are against the law and the evidence.

8th. Because the findings of said Master are inequitable and unjust."

Paragraph 1 of Exception XI distinctly asserts that the value was to be fixed of the entire property and appurtenances "for railroad purposes," and, although the Master fixed the value *for such purposes* higher than the estimates of the witnesses for the Colorado Company, the Wabash Company wanted a higher valuation. This was a plain admission that the value was to be fixed for *all* railroad purposes. Paragraph 2 of the same exception insisted that the value of the use should be divided *equally* between the two companies. The

plain meaning of the two paragraphs is that both companies were to have the equal use of the *whole* property for railroad purposes. This conceded the full right to use *all terminals* and *all property*. Paragraph 3 of exception XII confirms this view, because it sought to strike out the testimony of the witnesses for the intervenor for the reason that the valuations were *not* for railroad purposes.

(3) TESTIMONY OFFERED BY THE WABASH COMPANY SHOWS THAT THE RIGHT TO THE USE OF THE TERMINALS WAS TO BE ACQUIRED.

(a) As hereafter shown, both Col. Talmage, General Manager of the Receivers, (Rec. 97-98), and Col. How (Rec. 111), their General Agent, expressly refused to limit the right of way to any strip, and, as we shall now see, the Wabash Company obtained the valuation upon which was based the rental charge, by claiming that the whole property and all terminal facilities were to be included.

(b) The Master was right in saying that Col. Talmage, General Manager of the Wabash (Rec. 94-104), and Col. How, General Agent of the Receivers (Rec. 104-115), based their valuation *on the railroad as a whole, including appurtenances and terminal facilities.* Some extracts from the examination of Col. Talmage (Rec. 95, 97, 98-100, 102-103, 147, 149-150, 155) will show the trend of the testimony and the claim then made:

> "Q. What would you consider a fair valuation of the right of way and superstructure of the Wabash Railway from the north line of the park to the Union Depot *with such of its appurtenances as are necessary to operate it as a railroad in the city of St. Louis?*

Counsel for the intervenor objects to the question, as intervenor is not asking for the appurtenances.

The Master: *What do you mean by appurtenances?*

Mr. Blodgett: *I mean side tracks and such conveniences as are necessary to have in order to operate it as a railroad.*

The Master overrules the objection, stating that counsel can limit the matter in cross-examination if they desire.

A. I consider *that property* worth at least a million and a half.

Q. What do you include in that valuation?

A. I include the track, the main tracks and the side tracks.

Q. Does that include *all the property* of the Wabash in the Union Depot? A. *It includes the property between the west line of the park and the Union Depot, that is, the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for doing business.*

By the Master:

Q. Can you give me the value, or the approximate value, of the right of way and the main track from the north line of the park to Eighteenth Street and the Union Depot? A. I thought I had covered that in my testimony.

Q. You included the sidings? A. Oh, you mean the main track, stricken out from the sidings?

Q. Yes? A. *I couldn't do that without going into a calculation. We could not operate without the sidings, we could not pass trains nor take care of trains after receiving them, nor make them up to go out, without the sidings.*

Q. Would that be so with another road that would run over your track? A. Yes, sir; we would have to have additional track room if there was another road. We have not enough now to warrant our bringing another railroad in and be able to handle the trains successfully outside of loading and unloading of freight. I mean simply to pass trains, putting additional trains on the track, *taking care of them after they arrive here, making them up ready to go out, and the storing of cars; you can't do business without having some place to put your loads, and some place to put your empties away, some place to hold them to unload when people are not ready to unload them:* and the facilities are not sufficient here now to admit of our taking any more business without acquiring more property. *That is why I say the whole property wants to be taken in the valuation.*

By Mr. Priest:

Q. As an illustration, we will say that the St. Louis and San Francisco Railway Company desires to obtain the use of that part of the line of the Missouri Pacific Railway from Kirkwood into St. Louis to the Union Depot. The ordinary and usual arrangement that would be made between the two companies would be first to agree on the value of the Missouri Pacific line from Kirkwood into the Union Depot? A. Yes, sir.

Q. Suppose that value was two million of dollars; you would count that as one factor of the fixed charges, would you not? A. Yes, sir.

Q. What other factor would be added to that as a fixed charge? *A. The necessary terminals that must be used here in order to bring those trains in and prepare them to go out."*

Great weight should be attached to the statement of Col. Talmage. It shows that regardless of any knowledge he may have had as to the meaning of the word

"appurtenances," he was giving the value of the entire property and seeking to obtain a rental based upon such valuation. The word "appurtenances" when used by one as learned as Col. Blodgett in response to the direct question of the Master, was doubly significant, because he was thus re-enforcing the idea which Col. Talmage was endeavoring to present, and he knew that the word "appurtenances" included every railroad facility connected with the railroad property. So, if for any reason the word "right-of-way" should be held to have a restricted or limited meaning; "right-of-way and appurtenances" between certain points necessarily include the whole railway property, and such must have been the sense in which the word was used.

In *Missouri Pacific Railway Company* v. *Moffet*, 94 Mo., 56, 60, it was said:

> "Land, ordinarily, cannot be appurtenant to other lands or distinct parcel, or pass with it, as a part of it, or belonging to it, but here it is one contiguous adjacent piece, given and donated to the railroad in one and the same instrument. The word, appurtenant, has no inflexible meaning, but must be construed in connection with the nature and subject of the principal thing granted."

(c) That the valuation was not limited to any specific strip is apparent from a statement made in the Main Case (Rec. 111) by Col. How, General Agent for the Receivers, in detailing how he made his estimate of the value of the property for the use of which the Colorado Company was to pay. He said:

> "Q. In speaking of that valuation did you value a strip of land 30 feet in width; did you put the value of a whole lot upon that? A. *Yes,*

sir; we generally found it necessary for us to buy a whole lot when we wanted to buy 30 *feet only. A road cannot get along with 30 feet running into the city of St. Louis, as it has to have side tracks, as Col Talmage explained in his testimony.*

"Q. You can put a side track on 30 feet, and you have done that in regard to the Wabash Railway?

A. Yes, sir; *but you have to have several side tracks running into town.*

"Q. You are using this now to Grand avenue, are you not? A. I don't think to Grand avenue; *we have more than 30 feet beyond Grand avenue.* After you get towards Rock Springs *then we have been using that.*"

Col. Talmage never intended to limit his valuation to any strip, for he, in the Main Case (Rec. 97-98) said:

"Q. You have valued this road between the north line of the park and Eighteenth street at from a million and a quarter to a million and a half dollars, I understand? A. Yes, sir.

"Q. What do you include in that valuation?

A. *I include the track, the main track and the side tracks.*

"Q. Does that include *all* the property of the Wabash in the Union Depot? A. *It includes the property between the west line of the park and the Union Depot, that is, the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for doing business.*

"Q. How much real estate has the Wabash road outside of this 30 feet of right of way? A. Not a great deal, *some fractional pieces; it was necessary to acquire them in order to get the right of way that was acquired.*"

"Q. Does this plat show them? You seem to have whole blocks here, nearly. Now, outside of this right of way, what is this real estate worth?

A. The bulk of them—I do not know whether that map is made up to the present time and shows the side tracks that are in there or not.

"Q. *Here is nearly a block of ground, I see?*

A. *Yes, sir; that is covered with tracks.*

"Q. *Those are side tracks for storing your cars?*

A. *For switching and handling trains. You can't run trains unless you have got a place to pass trains and put them out of the way or a place to put trains when they arrive here, so that you can handle them and sort out the cars and get them out of the way of trains going out. All this ground, nearly, is covered with tracks.*

"Q. Your company does a large business?

A. We do some considerable business."

(4) THE OPINION OF MR. JUSTICE, THEN CIRCUIT JUDGE BREWER.

Mr. Justice, then Circuit Judge, Brewer (29 Fed. Rep. 546, 554, 555; Rec. 304, 305-306, 456-457) thus dealt with the question:

"It is insisted that by this stipulation the Railroad Company agreed to permit the use of its right of way, and did not agree to permit the use of its track or road-bed, and that the road should not be bound, therefore, beyond the very letter of its obligation. * * * The language of the ninth paragraph, under which, as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its 'right-of-way.' Now the term 'right-of-way' has a two-fold signification—it sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to de-

scribe that strip of land which railroad companies take upon which to construct their roadbed. Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the terms 'right-of-way,' 'track,' and 'road-bed' frequently appear, and in all cases the term 'right-of-way' is used as descriptive of the strip above referred to. Notably, in the fifth paragraph, is the distinction between 'right-of-way' and the 'track' disclosed, in which it is provided that the depot shall be wholly outside of the right-of-way, but immediately adjoining the track. Now, the right-of-way through the park, as given by the Griswold deed, was 40 feet; as fixed by the contract with the Forest Park Commissioners, was 70 feet; and by this present contract, 42 feet. So the County Road conveyed to the Kansas Road, outside of the park, a strip either 30 or 28 feet in width for its right-of-way. My thought, at first, was that the intervenors could only claim a right to use so much of this right-of-way as was not, in fact, occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas Road's right-of-way as it did not itself occupy and use; but, after reflection on the arguments of counsel, I have been led to the conviction that this was too narrow a construction, and was not the real intent of the parties. The Master, in his report, shows that the entire right-of-way is occupied by tracks and sidings, so that there is no room for another and independent track; and as there is nothing to show that this occupation has not been made in good faith, and to supply the needs of the Wabash Company, if my first interpretation had been correct, the intervenors would plainly be without any rights. I think, however, the true construction is this: that the Kansas Company was to have the

first right—a right not limited to its necessities, but as broad as its convenience. Subject, and only subject, to such prior right, other companies were to have the use of the right-of-way, and if the respondent's business compelled the occupation by its tracks or sidings of the entire right-of-way, but the convenience of its business would permit the use of those tracks and sidings by another road, then such other road would be entitled to the use of both the right-of-way and the tracks and sidings. This construction is, I think, in accordance with the obvious intent of the parties, who were contracting for general rights, and not fixing the specific details."

He subsequently put the matter beyond all doubt in sustaining the contention of the Wabash Company, that since the Colorado road obtained the equal use and benefit of the property as a railroad, it should pay one-half of the value of the use instead of paying, as the Master recommended, upon a wheelage basis or in proportion to the use. His language (29 Fed. Rep. 546, 559 Rec. 310) in this respect was:

"The final matter is that of compensation. In this I think the Master erred. He fixed the value of the right-of-way at a million of dollars; and reported that, in his judgment, the share of the interest on this value, and in the expenses of keeping up the track, which the intervener company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track I see no reason to doubt the justice of the rule fixed by the Master; but, in regard to the interest on the value, I think the intervener should pay one-half of that, and for these reasons: It is a familiar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufactur-

ing establishments, warehouses, and other buildings, for the convenient transaction of business between the carrier, on the one hand, and the manufacturer and the merchant, on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, *but also shares in the benefit of access to all these manufactories, warehouses, etc.* It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way, it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. Under those circumstances it seems to me no more than fair that a new company, which crowds itself *into an equal access* to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence, I shall sustain the objections of the respondent to the report of the Master, so far as concerns the amount of the compensation, and I think that the intervener company must pay one-half the interest on the value, and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects, the report of the Master will be confirmed."

Can it be possible that the Wabash Company could, after thus getting the price to be paid, based upon the equal use of *all the railroad*, including terminal access to private industries and after collecting on that basis for sixteen years, be permitted to turn around and say there was only a limited right to a strip of narrow width?

5th. THE DECREE OF THE TRIAL COURT IS AS BROAD AS THE CONTENTION OF THE COLORADO COMPANY.

The decree (Rec. 4-7, 292-296), when read in the light of that which has already been narrated, is as broad as the contention of the Colorado Company. A few extracts therefrom may be quoted. Thus, in fixing the compensation, it (Rec. 293-294) recites:

> "And the Court finds, adjudges and decrees that the basis of compensation to be paid by the intervener, the St. Louis, Kansas City & Colorado Railroad Company, for the use of the right-of-way and the tracks, side-tracks, switches, turn-outs, turntables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth Street in the city of St. Louis, shall be the value of said right-of-way, tracks *and other property last described*, as determined by the Master in his said reports; and the compensation to be paid shall be, per annum, six per cent on one-half of the value of said *right-of-way, tracks, side-tracks, switches, turnouts, turntables and other terminal facilities*, and the said one-half value is and shall be taken to be $500,000."

So, in dealing with the rules and regulations under which the Colorado Company was (Rec. 294) to use the property:

> "And the Court doth further order, adjudge and decree, that the running of all *trains*, engines or cars of said intervener, the said St. Louis, Kansas City & Colorado Railroad Company, over said right-of-way and tracks, and *the use of said right-of-way, road, terminal facilities and other property specified as aforesaid*, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter

be adopted by the said Wabash, St. Louis & Pacific Railway Company, or its said Receivers, to enable said intervener to fully enjoy the benefits of this decree."

The injunctive portion of the decree (Rec. 295, 296,) provides:

"And the Court doth further order, adjudge and decree, that in all respects, subject to the terms of this decree, the said Railroad Company intervenor, shall enjoy *the equal use and benefit of said right-of-way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities with said Wabash, St. Louis & Pacific Railway Company*, or its said Receivers, and the said Wabash, St. Louis & Pacific Railway Company, and Solon Humphreys and Thomas E. Tutt as such Receivers, and said Central Trust Company of New York, and James Cheney, and all persons claiming by, through or under them, and each of them respectively, and their agents, servants, counsellors and employes, be and the same are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervener, the said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, and its or their officers, agents, and employees, from using with it or their engines, cars (loaded or empty), the said *right-of-way, tracks, switches, side-tracks, turnouts, turntables and other terminal facilities* of said Wabash, St. Louis & Pacific Railway Company between the north line of said Forest Park and said Eighteenth Street on the terms hereinabove set forth in this decree in and for the transacting of its or their business and in the operation of its or their road. And the said intervener, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents and employees, and each of them, is hereby authorized

and permitted, with its right-of-way, road, tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park, and *to use the said right-of-way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities* of said Wabash, St. Louis & Pacific Railway Company, or any one claiming by, through or under it as to the same, between the north line of said park and Eighteenth Street, on the terms, in the manner and subject to the regulations in this decree set forth, in and for the transaction of the business and in operation of the road of said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns; and said Solon Humphreys and Thomas E. Tutt, receivers, and all agents, servants or persons by them engaged or acting with or for them; said Central Trust Company and James Cheney; said Wabash, St. Louis & Pacific Railway Company, and all persons claiming by, through or under said last named Company, are hereby restrained and enjoined from in anywise obstructing, preventing, interfering with or refusing to comply with the permit and privilege ordered, adjudged and decreed."

The language of this decree does not limit the right of way. If limited in that regard, many words thereof and provisions therein for the use of facilities are nugatory and useless. Exhibit D (Rec. 591) shows the land as it was (Rec. 27, par. 14) when the decree in the Main Case was entered and the dates of the construction of some of the industrial tracks. A comparison of Exhibit D (Rec. 592) with Chart A (Rec. 591) shows the same land, Chart A not showing, while Exhibit D does show, the tracks and facilities thereon. The decree gives the use of the "right of way, tracks, switches,

side-tracks, turn-outs, turn-tables, *and other terminal facilities.*"

Mr. Justice Brewer in his opinion (Rec. 305-306) said:

> "The master, in his report, shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track."

It is also, therefore, manifest that the terminal facilities mentioned in the decree were not and could not all be on any specific strip. So, when the learned jurist (Rec. 310) increased the allowance of the Wabash Company on the ground that the Colorado Company crowded "itself into an equal access to such benefits and such privileges" as came from the use of the industrial tracks, he manifestly meant in the decree to include them therein by the use of the words "other terminal facilities", all parts of which could not possibly have been located on the strip which Judge Sanborn had in mind as an inspection of Exhibit D will show.

(6) The Contention of the Wabash Company in The Supreme Court.

In Col. Blodgett's printed argument (Rec. 29) in this Court he said:

> "V.
>
> THE COURT ERRED IN ENTERING A DECREE BROADER THAN THE CONTRACT.
>
> Even if the *ninth* clause of the tripartite agreement was binding on the Kansas City Company, it only reqired it to permit other railroads to use *"its right-of-way"* and yet a decree was entered

giving respondent the use of 'the right-of-way, tracks, switches, turnouts, turntables, and *other terminal facilities of the Wabash Company*' at St. Louis.

Again, the decree is not only broader than the contract, *but it is broader than the prayer of the petition.* The prayer of the petition is, that the Colorado Company be permitted to use the *right-of-way* of the Wabash Company, 'commencing at the north line of said park, thence over *said right-of-way* to Eighteenth Street in said city of St. Louis, by running its engines and cars over and upon said right-of-way, *including the tracks* of said Wabash Company between said points.'

The contract only related to 'right-of-way;' the prayer of the petition was for the use of 'right-of-way and tracks,' and the decree not only gives them the use of the 'right-of-way and tracks,' *but it subjects to the use of respondent the 'switches, side-tracks, turnouts, turntables and other terminal facilities,' and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use.*

Therefore, no matter what views may be taken of the case in other respects, the decree was erroneous in two particulars: *First*, because it is broader than the covenant; and, *Second*, because it is broader than the prayer of the bill. Both these objections are elementary."

In the report of the case (138 U. S. 1, 25) his argument is thus condensed:

"V. The Court erred in entering a decree broader than the contract.

The contract only related to right-of-way; the prayer of the petition was for the use of right-of-way and tracks, and the decree not only gives

them the use of the right-of-way and tracks, but it subjects to the use of the respondent the switches, side-tracks, turnouts, turntables and other *terminal facilities*, and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use. Therefore, no matter what view may be taken of the case in other respects, the decree was erroneous in two particulars: First, because it is broader than the covenant; and second, because it is broader than the prayer of the bill. Both these objections are elementary."

Mr. Justice Blatchford (id., 38) clearly understood the contention, as he thus stated it:

> "It is contended by the appellants that the Circuit Court erred * * * (5) in making a decree broader than the contract in that the County Company only agreed, at most, to permit other companies to use *its* right of way, while the decree gives the right to use the right of way, and tracks, side-tracks, switches, turnouts, turntables and *other terminal facilities of the Wabash Company.*

(7) If there is Any Such Thing as Res Adjudicata, it Exists Here.

In *Washington etc. Co.* v. *Sickles*, 24 How. 333, 343, 344, L. Ed., Mr. Justice Campbell said:

> "Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the facilities for litigation. For this purpose, the presumption has been adopted, that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragable truth. This presumption is a guarantee of the future efficacy and binding operation of the judgment. It presupposes that all the constituents of the judg-

ment shall be preserved by the court which renders it in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges, this has been done without much difficulty. The separate functions of the judge and jury, in common-law courts, created a necessity for separating issues of law from issues of fact; and with the increase of commerce and civilization, transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading, which was conducive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication, has been condemned as requiring unnecessary precision and subjecting parties to over-technical rules, prolixity, and expense. A system of general pleading has been extensively adopted in this country, which rendered the application of the principle contended for by the plaintiff impracticable, unless we were prepared to restrict within narrow bounds the authority of *res judicata*. It was consequently decided that it was not necessary, as between parties and privies, that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defense, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury."

In the leading case of *Cromwell* v. *Sac County*, 94 U. S. 351, 352, 353 L. Ed. Mr. Justice Field said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as to an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the

judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Tested by either rule, the *res adjudicata* exists. Every question that is now suggested not only *might* have been litigated, but was in fact actually presented and determined. The purchasing trustees under the foreclosure decree became parties appellant by substitution, and they in turn conveyed the property to the Wabash Western Railway Company, which consolidated into the present Wabash Company. The doctrine of *res adjudicata* applies to privies, for, as said in 1 Freeman on Judgments (4th Ed.), section 165:

"A person who purchases property, real or personal, is entitled to the benefits and subjected to the disadvantages which, by the operation of final adjudications, had attached to the property in the hands of its former owner."

At section 193:

"It is now a universally recognized rule of law that no alienation or transfer of the subject-matter of the controversy, made while the suit is being prosecuted with due diligence, need be noticed by the parties to the action. Such alienation, though valid between the parties thereto, is void

as against the judgment or decree finally rendered in the suit."

Upon the former appeal (138 U. S. 1, 35, 34 L. Ed. 843) the question was thus disposed of:

"In the present case, the tripartite agreement is a link in the chain of the title of the mortgagees and of the purchasing committee. The right-of-way through the park, granted by Griswold to the County Company November 3, 1871, was lost by non-user. The right-of-way granted by the Park Commissioners to the County Company under the first park act, of March 25, 1872, failed because that act was declared unconstitutional, in *Chouteau* v. *Leffingwell*, 54 Missouri, 458. The third line, that established by the tripartite agreement, was not identical with either of the two prior lines. The Park Commissioners, therefore, granted to the two companies, under the tripartite agreement, all the right-of-way which they acquired in the park. The right of the mortgagees and of the purchasing committee to use such right-of-way is based solely upon that agreement; and, holding under it, they must hold subject to its terms and conditions, irrespectively of the question of notice. *Whitney* v. *Union Railway*, 11 Gray 359; *Vandoren* v. *Robinson*, 16 N. J. Eq. 256; *Tulk* v. *Moxhay*, 2 Phillips 774; *Luker* v. *Dennis*, 7 Ch. D. 227; *Western* v. *Macdermott*, L. R. 2 Ch. 72. Therefore, the Wabash Company, the mortgagees, and the purchasing committee must be held to have had notice of the covenants and conditions of the tripartite agreement prior to the execution of the mortgage, and are bound by them, whether the covenants be or be not strictly such as run with the land."

IV.

REGARDLESS OF ANY TECHNICAL RULE AS TO RES ADJUDICATA, THE OPINION OF THE

SUPREME COURT AFFIRMING THE ORIGINAL DECREE IS THE LAW OF THIS CASE, WHICH THIS COURT CANNOT CHANGE OR MODIFY. ALL IT CAN DO IS ENFORCE THE THE DECREE.

The rule has often been stated when a second appeal or writ of error was taken in the same case.

In *Supervisor* v. *Kennicott*, 94 U. S. 498, 499, Mr. Chief Justice Waite said:

> "These questions are, therefore, no longer open; for it is settled in this Court, that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit."

In *Clark* v. *Keith*, 106 U. S. 464, 465, Mr. Chief Justice Waite said:

> "That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit. This rule was distinctly stated in *Supervisors* v. *Kennicott*, 94 id. 498, where numerous authorities are cited, beginning as early as *Himely* v. *Rose*, 5 Cranch 313."

In *Thompson* v. *Maxwell etc. Co.*, 168 U. S. 451, s. c. 18 Sup. Ct. 111, 123, Mr. Justice Brewer said:

> "It is settled law of this Court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Supervisors* v. *Kennicott*, 94 U. S. 498, and cases cited in opinion; *Clark* v. *Keith*, 106, U. S. 464, 1 Sup. Ct. 518; *Railroad Co.* v. *Ellis*,

144 U. S. 458, 12 Sup. Ct. 724; *Telegraph Co.* v. *Burnham*, 162 U. S. 339, 343. 16 Sup. Ct. 850."

This rule applies to the Circuit Court of Appeals hearing a second appeal of a case that had formerly gone to the Supreme Court.

In *People* v. *Ill. Cent. R. Co.* 91 Fed. Rep. 955, 957, s. c. 34 C. C. A. 138, Judge Jenkins said:

> "We are, however, not permitted to enter into the field of discussion of this most interesting question because, as we think, our duty is limited by the mandate of the Supreme Court to the consideration of the single question of fact whether the structures in question 'extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake." Nothing is open to consideration except the specific subject of inquiry reserved by the mandate of the ultimate tribunal. All else is final and conclusive between the parties. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291."

Manifestly, if an appellate court upon review of a decision of this motion is bound arbitrarily by the former decision of the Supreme Court, the Chancellor hearing the same below was likewise bound, and so it has been repeatedly decided.

In re *Washington & Georgetown R. C.*, 140 U. S. 91, 97, a judgment for personal injuries was entered with no provision for interest. It was affirmed. Subsequently the lower court on motion allowed interest. The Supreme Court subsequently by mandamus enforced the original judgment without interest, Mr. Justice Blatchford saying, among other things:

"We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the special term, or whether it would have been proper for the special term, in rendering the judgment, or otherwise, to have allowed interest upon it, or whether it would have been proper for the general term to do so, but we render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this Court awarded no interest in its judgment of affirmance, all that the general term could do, after the mandate of this Court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the general term, and directing execution of the judgment of the special term of December 18, 1885, with costs and without interest, and of the judgment of the general term of June 28, 1886, for costs."

In *Gaines* v. *Rugg*, 148, U. S. 228, 238, 239, 240, 241, where a decree was only reversed on one point and Judge Caldwell attempted to retry the case, the Supreme Court compelled him by mandamus to execute the mandate, Mr. Justice Blatchford, among other things, saying:

"It is contended for the respondent that the construction of the intent and meaning of the opinion of this Court in *Goode* v. *Gaines* was a matter for the exercise of judicial discretion by the Circuit Court. But we are of opinion that it is proper for this Court, on this application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the Circuit Court has erred, or acted beyond its province, in construing the mandate and opinion, to correct the mistake now and here, and to do so

by a writ of mandamus. Obeying the mandate of this Court, and proceeding in conformity with its opinion, in the present case, were not matters within the discretion of the Circuit Court, and, therefore, the cases which hold that this Court will not direct in what manner the discretion of an inferior tribunal shall be exercised do not apply to the present case. . . . As the decree of the Circuit Court in regard to the title was not invalidated by the action of this Court on the appeal, the Circuit Court had no right to set aside that decree as respected the title nearly five years after it was rendered. The decree was beyond the control of the Circuit Court, unless on a bill of review duly filed, and the time for filing a bill of review had long ago elapsed. The Circuit Court could do nothing to affect the decree, except in obedience to the mandate of this Court *Chaires* v. *United States*, 3 How. 611, 620."

In re *Sanford Fork & Tool Co.*, 160 U. S. 247, 255, 256, Mr. Justice Gray said:

"When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That Court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibbald* v. *United States*, 12 Pet. 488, 492; *Texas & Pacific Railway* v. *Anderson*, 149 U. S. 237. If the Circuit Court mistakes or misconstrues the decree of this Court, and does not

give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this Court. *Perkins* v. *Fourniquet* 14 How. 313, 330; *In re Washington & Georgetown Railroad*, 140 U. S. 91; *City Bank* v. *Hunter*, 152 U. S. 512; *City Bank, petitioner*, 153 U. S. 246."

In *Sibbald* v. *U. S.*, 12 Pet. 488, 492, Mr. Justice Baldwin said:

"When the Supreme Court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the Court below to award it. 24 sect. Judiciary Act, 1 Story's Laws, 61. Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matted decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. I S. C. 194, 197; I H. & M. 557; 3 Menif. 228. After a mandate, no rehearing will be granted. It is never done in the House of Lords; 3 Dow. P. C. 157; and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. 5 Cranch 316; 7 Wheat. 58, 59; 10 Wheat, 443."

It follows, therefore, that the mandate of affirmance from this Court was a direction to the Circuit Court to execute the original decree. It had no discretion in the premises.

V.

THE PREDECESSORS OF THE WABASH COMPANY HAVING HAD THE COURT ONCE FIX THE COMPENSATION TO BE PAID UPON THE BASIS OF THE EQUAL USE OF ALL THE PROPERTY, THAT COMPANY WILL NOT NOW BE PERMITTED TO OCCUPY THE INCONSISTENT POSITION OF CLAIMING THAT THE COLORADO COMPANY MUST MAKE ANY LESS USE OF ANY LESS PROPERTY; AND THIS REGARDLESS OF ANY TECHNICAL RULES OF RES ADJUDICATA LAW OF THE CASE, OR STRICT ESTOPPEL.

It has already been seen that at the insistence and upon the testimony of the officials of the Wabash Company the fixed charge for rental was established upon the theory that the Colorado Company obtained the equal use of *all* the property and its terminal facilities. Having assumed that position in court, at one time, there can be no change of front now, no matter if the former position was wrong, nor even if it was taken by mistake. No technical rule of estoppel need be invoked, as well settled principles of law determine the question.

In Bigelow on Estoppel (5th Ed.) 673, it is said:

> "A party cannot either in the course of litigation or in dealing *in pais* occupy inconsistent positions. Upon that rule election is founded; 'a man shall not be allowed,' in the language of the Scotch law, 'to approbate and reprobate.' "

In a note upon the same page the same author says:

"It may be doubted whether this subject properly belongs to the law of estoppel. Still, it has come to be so generally treated as a phase of estoppel that we have not felt at liberty to omit it. See *Strosser* v. *Fort Wayne*, 100 Ind. 443, 452. Indeed, it is perhaps well to bring together the scattered fragments of the law having a resemblance to election, and give them a common name. The right in all these cases, including that of election, is specific, and therefore so far like estoppel. Hence, the name 'election' not having met with favor beyond its old limits, we venture to name the whole group of cases 'Quasi-Estoppel.' "

At pages 689, 690, he says:

"A remarkable case, to be received with hesitation, may now be noticed. It has been laid down that persons who have procured the passage of an act of the Legislature, under which they have acted and obtained benefits, are estopped to show that the act was unconstitutional, though it may have been so pronounced by the courts concerning those who had not participated in its passage."

After giving many instances where persons will not be permitted to occupy inconsistent positions, the author (pp. 693, 694) concludes:

"Many of the cases upon this subject, it will be noticed, are simply cases of ratification or acquiescence; and it is a questionable use of terms, as we have seen, to apply the word 'estoppel' to them. * * * So far as the term 'estoppel' is used as a synonym in such cases with 'bar' or 'preclusion,' there is no great objection to its use; the objection to using it in cases of ratification and the like is that it is misleading. Ratification and acquiescence suppose the existence of something incomplete in regard to its legal consequences; hence

they cannot be a *kind* of estoppel in themselves. At most they are but facts which may serve to supply something otherwise wanting to an estoppel."

In 11 Amer. & Eng. Enc. of Law (2d Ed.), 446, 447, it is said:

> "Under the head of estoppel is often discussed also, though with questionable propriety, the doctrine of inconsistent positions whereby a person is precluded from taking, merely because his interests have changed, a position inconsistent with one previously assumed by him, and to the prejudice of a third person * * * It has been laid down as a general proposition, that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The Federal Courts have been especially strict in enforcing this principle.

In *Philadelphia etc. R. Co.* v. *Howard*, 13 Howard 307, 337, Mr. Justice Curtis said:

> "We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form, should sustain another on a like point."

In *Railway Company* v. *McCarthy*, 96 U. S. 258, 267, 268, Mr. Justice Swayne said:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to amend his hold. He is estopped from doing it by a settled principle of law."

In *Daniels* v. *Tearney*, 102 U. S. 415, 421, Mr. Justice Swayne said:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."

In a recent case (*Davis* v. *Wakelee*, 156 U. S. 680, 689, 691) it was held that where in one case a party asserted that a judgment had been rendered against him he could not thereafter assert the invalidity thereof, although there was in fact no jurisdiction. The cases were thoroughly reviewed, Mr. Justice Brown, among other things, saying:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary posi-

tion, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. * * * It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it. He obtained an order which he could only have obtained upon the theory that the judgment was valid—his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position."

In *Brooks* v. *Laurent*, 98 Fed. Rep. 647, 654, s. c. 39 C. C. A. 209, Judge Shelby said:

> "It is contrary to the first principles of justice that a party should be permitted to assert rights under a contract, and obtain advantages, or seek to obtain them, by litigation based on its validity, and in a subsequent proceeding relating to the same contract claim that it was without validity, and not binding on him. It seems well settled by principle and authority that a party to a suit is not permitted to take inconsistent positions to the detriment of his adversary on material questions involved in the litigation."

Applying these rules here we have this plain case: An increased rental was obtained from the Master because of the testimony of the General Manager of the Wabash Company and the position of its counsel that

the Colorado Company was obtaining the use of *all* the railroad property and terminal facilities. Thereafter, instead of paying a rental on the basis of the use actually made, the Wabash Company obtained from the Circuit Judge a ruling requiring the payment of the full one-half value of the *entire* use of *all* the property because the Colorado Company obtained the *equal* right to and benefits of *all* terminals.

So it is submitted that, irrespective of the questions of *res adjudicata* and law of the case, heretofore presented, the Wabash Company cannot occupy the inconsistent position of denying to the Colorado Company the equal use of all the property. The flagrant injustice of its being permitted so to do becomes the more apparent when it is suggested that for nineteen years it received large sums of money in rentals paid upon the faith of its former position and the decree which it obtained by virtue thereof. If there had been no decree the construction of the parties would have been conclusive. With a decree there should be an estoppel against a contrary construction.

VI.

THE DECREE IN THE MAIN CASE SHOULD NOT BE LIMITED BY CONSTRUCTION.

(a) While it is true (*Graham* v. *R. Co.*, 3 Wall. 704, 18 L. Ed. 247, 251) that where there is doubt as to the meaning of the decree, it will by construction be limited to the issues made by the pleadings, yet this rule has no application where there is no doubt as to the meaning of the decree. As said in *Weehawken Ferry Co.* v. *Sisson*, 17 N. J. Eq. 475, 481, 482):

"For some purposes, it is not doubted, the pleadings in a suit in equity are to be taken and examined in connection with the decree. It is certainly true, as it was insisted, that the rule of law requires the pleadings to be adduced, when the decree is brought into court as evidence. The reason of this rule is obvious. There are few decrees which do not, in some particulars, refer to the pleadings, either expressly, or by necessary implication. In such cases, where the decree refers to the pleadings, or to an intrinsic document, as containing a statement of facts necessary to the decree, and not embodied in it, such pleadings, or such document, as far as referred to, upon general principles, become part of the decree, for every purpose of construction. But in the case before us the decree, on the point in issue, made no allusion to the pleadings; it was complete and intelligible in itself; and the pleadings were to be ransacked to give it a meaning which its language, without such help, would not convey. I have examined with care the many cases on the printed brief of counsel, and I do not find one of them which countenances such a proposition. I do not find even a dictum which warrants the idea, that where a final decree has been made, which is complete in itself, and in which the language is intelligible, the bill or the answer can be read for the purpose of limiting the force of its words and controlling its legal effect."

(b) While the plea of *res adjudicata* is only good where the same issue is presented, yet the word "issue" does not necessarily mean that the pleadings in the original cause must present the precise question. If by motion, proofs, pleadings, or otherwise, the question was necessarily involved or was presented, controverted and decided, then it was in issue within the meaning of the rule.

Thus in 24 Am. & Eng. Enc. L., 766, it is said:

> "Hence it is not necessary to the conclusiveness of a former judgment that issues should have been taken upon the precise point controverted in the second action. Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded."

Reynolds v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464, 468, is a good illustration. Mr. Justice Brewer there announced the doctrine that where the defendant does not appear at the trial, the decree must be limited to the precise matter claimed in the bill, but where the party was present at the trial, actually litigating a matter not specifically put in issue by the pleadings, still the fact of the controversy made an issue within the meaning of the rule. He said:

> "In such a case, the proposition so often affirmed that that is to be considered as done which ought to have been done may have weight, and the amendment which ought to have been made to conform to the pleadings and the evidence may be treated as having been made."

This doctrine has been applied frequently. Thus, in *Newman* v. *Bullock*, 23 Col. 223, 47 Pac. 379, 381, an intervenor in a suit in which ownership of certificates of stock was in question, presented for determination without pleading, or objection, a question as to the validity of the certificate. The decision as to this was held to be *res adjudicata*, though the pleadings technically presented no such defense. The court, after citing *Reynolds* v. *Stockton*, 140 U. S. 254 said:

> "We may concede that the issue joined between the plaintiff Bullock and the defendants was over

the ownership of a certificate of stock, and that a new or different issue cannot be introduced in a cause by a petition of intervention, and that said new issue, if it was present at all in the case, was brought in by the mining company in its answer to the petition of intervention, filed by the bank, and that it was, in fact, an issue different from that in the main action. If a proper objection had been seasonably interposed, neither the intervenor nor the one answering to its petition of intervention could have been permitted to change the issue joined in the main action. *Van Gorden* v. *Ormsby,* 55 Iowa, 657, 8 N. W. 625; *Mayer* v. *Stahr,* 35 La. Ann. 57 17 Am. & Eng. Enc. Law, 646 et seq. But if such new issue is of such a nature that in a proper case it comes within the jurisdiction of the court, if no objection in the lower court is made by any of the parties concerned to its introduction into the case, no such objection can thereafter be made or raised upon a direct review of the judgment, much less upon a collateral attack by the very party who tendered the issue. *McKenty* v. *Gladwin,* 10 Cal. 227; *Smith* v. *Penny,* 44 Cal. 161; *People* v. *Reis,* 76 Cal. 269, 18 Pac. 309; *Sanxey v. Glass Co.,* 63 Iowa 707, 17 N. W. 429; 17 Am. & Eng. Enc. Law, 648."

In *Gates* v. *Newman,* 18 Ind. App. 398, 46 N. E. Rep. 654, 656, a similar distinction was made.

In *Oliphant* v. *Burns,* 146 N. Y. 238, 40 N. E. Rep. 980, 986, a decree for specific performance included land not specifically mentioned in the complaint, yet as the parties were present at the trial and took part in the proceedings, it was presumed that such land was inserted by the consent of the parties, and therefore the original decree was *res adjudicata,* the court, among other things, saying:

"We must presume, therefore, what we have no doubt is in accordance with the facts of the case, that the complaint was treated and regarded as though in purpose formally amended and the land so inserted in the judgment with the consent of the parties to the action."

In *Compton* v. *Jessup,* 15 C. C. A., 397, 68 Fed. Rep. 263, 295, 296, it was decided that the decree was *res adjudicata* where there was included in the decree part only of property upon which it was sought to subject a lien, parties being present at the trial. Judge Taft said:

"The prayer of Compton was for the enforcement of his lien by the sale of the whole railroad. If he asked for a sale of the whole property, the court had the right to enforce in his favor that remedy, or any remedy less than that which it thought just and proper. It was therefore within its jurisdiction, as invoked by Compton's prayer, to take as much of the property on which it declared the lien to exist as, in equity, it thought it had the right to take. It took that over which it had territorial jurisdiction. See opinion of court in 45 Ohio St. 592, 623, 16 N. E. 110, and 18 N. E. 380. Whether it erred in this, neither the court below nor this court is vested with the power to decide. It is true that the record does not show that any formal issue was made with reference to the amount of property to be sold to pay the lien, but this can make no difference. The court was bound, before it made an operative decree, to specify the property to be sold to pay the lien (*Railroad Co.* v. *Swasey,* 23 Wall. 405), and it was plainly within its power to subject less than that prayed for by the plaintiff to such a sale. The parties were present in court and might have objected to this form of remedy. Whether they did

> so, or not, the granting of the remedy, being within the prayer of Compton, was a binding and conclusive adjudication upon the parties in court that such a remedy was proper."

In *Jonathan Mills Mfg. Co.* v. *Whitehurst*, 19 C. C. A. 130, 72 Fed. Rep. 496, 503, the rule was by Judge Taft applied where the decree compelled the assignment of a specific patent not specifically mentioned in the bill.

(c) To determine whether any matter was in issue within the meaning of the law, it is, of course, necessary to consider the nature of the action, and as said in *Joy* v. *St. Louis*, 138 U. S. 1.

> "The prayer for injunction * * was a prayer for all that is necessary to secure, practically a specific performance of the agreement."

Hence, the action was in substance and in effect one in specific performance, and besides the prayer for specific relief, the original petition (Rec. 37), as well as the amendment (Rec. 160), asked for "such further relief in the premises as is consistent with equity and good conscience and as to this honorable court may seem meet." Under a general prayer, the rule is that any kind of relief can be given, consistent with the facts. (*Watts* v. *Waddle*, 6 Pet. 389; 8 L. Ed. 437; *Stevens* v. *Gladdy*, 17 Wall. 455, 15 L. Ed. 158; *Root* v. *R. Co.* 105 U. S. 194; 26 L. Ed. 177; *Wiggin's Ferry Co.* v. *O. & M. R. Co.* 142 U. S. 413, 35 L. Ed. 1062.)

In 20 Enc. Pl. & Pr., 511, 514, it is said:

> "Under a prayer for specific performance and general relief, the court may mould its decree according to the circumstances as they appear at the hearing. Where the special prayer which the plain-

tiff inserts is for a specific performance and a prayer for general relief is coupled with it, other relief may be granted under the general prayer, whether the special prayer is allowed or disallowed. Thus it has been held that under the prayer for general relief a decree for the payment of money may be granted and a lien secured by the contract may be declared enforced. So under the prayer for general relief, the court may, in its decree, protect the plaintiff against the dower interest of the defendant's wife. A decree rescinding the contract and awarding compensation to the complainant may be granted under the general prayer. A decree reforming the contract is improper as being inconsistent with the case set up in the bill, even though the bill contains a prayer for general relief in addition to the one for specific performance, where the bill contains no suggestion that there has been any mistake in making the contract. Where the bill prays for the reformation of the deed and also contains a prayer for general relief, specific performance may be granted under the general prayer although not prayed for specifically. In a suit for the specific performance of a contract of sale the vendor may, under the prayer for general relief, recover possession of the land sold."

Besides this, in specific performance, a decree can always be made upon condition, moulded to suit the equities and "modify the demands of parties according to justice." (*Willard* v. *Taylor*, 8 Wall. 557, 19 L. Ed. 501, 504; *McComas* v. *Easly*, 21 Grattan 31; *West Virginia Construction Co.* v. *Vinal*, 14 W. Va. 687).

As said in 20 Enc. Pl. & Pr. 478, 479:

"The court will mould its decree so as to fit the circumstances of each case. The general rule is that the parties must be placed in the same situa-

tion as if the contract had been performed according to its terms. But where specific performance of an agreement is impracticable, the plaintiff may have approximate relief in some other form which will secure to him the substantal advantages of his contract. The court is bound to see that it really does that complete justice at which it aims and which is the ground of its jurisdiction."

So, even where specific performance cannot be enforced because the contract is in parol, a decree may go to restoring the *status quo* (id. 493.), or where it is refused because of uncertainty, a return of the consideration may be required (id. 495.) So (id 496) it has been said:

> "A decree for specific performance should ordinarily enforce the whole contract,—the stipulations in favor of the defendant as well as those in favor of the plaintiff."

When a conveyance is compelled, a decree should require the plaintiff to make the payments required by the contract (id. 497), failing in which, the right to a specific performance may be barred (id. 498), or the property sold for purpose of raising the money (id. 499) with which to make the payments. So if a vendee is required to perform his contract, he may, at the same time, be awarded compensation for the injuries caused by the vendor (id. 499). So (id. 500, 502) it has been said:

> "Affirmative relief may be granted to a defendant as an incident to requiring the plaintiff himself to do equity. If a party appeals to a court of equity for the specific performance of a contract, he must himself do equity and submit to such terms as a court of equity will impose. The plaintiff must

consent to do what he would have been compelled to do if the other party had sought specific performance. Accordingly, whenever specific performance is decreed, the court may at the same time impose terms upon the plaintiff in order to make the decree equitable to all parties. Thus, where the plaintiff has delayed so long in filing his bill that it would be inequitable to permit him to demand an accounting of profits from the defendant, specific performance will be decreed only on terms that an accounting be denied. So the plaintiff may be charged with interest upon unpaid installments of purchase money. It is upon this principle that the plaintiff may be required to pay the purchase money even though the statute of limitations has run against the claim therefor."

This right to impose conditions, modify the demands of the parties according to justice, or mould the decree to suit the equities of the case, authorizes the court to grant the relief to the defendant without any necessity of pleading upon his part by way of cross bill. Thus, in 20 Enc. Pl. & Pr. 502, 503, it is said:

"According to the former practice, upon a bill for specific performance the court could decree in favor of the plaintiff only, leaving the defendant to obtain by a cross-bill that to which he was entitled. But according to the later practice the court may, if called on, dispense with a cross-bill and pass a decree upon the whole case, as well in favor of the defendant as of the plaintiff, as that one shall convey the property and the other pay the purchase money. The court may decree specific performance by both parties, without the filing of a cross-bill, where the agreement averred in the bill is admitted by the answer, or where the contract set up in the answer and proved is materially different from that alleged in the bill. The defendant may

> have a decree for the return of the earnest money paid without filing a cross-bill, where the title offered is bad and the return of the money is insisted upon in the answer."

(d) Another consideration frequently adverted to by the courts in dealing with the question whether an issue has been made is that any omission made in the original bill may be supplied, or aided by the averments in the answer. Thus, in *Newman* v. *Bullock*, 23 Col. 223, 47 Pac. Rep. 379, 381, a fact was brought in by answer that was not referred to in the petition, and it was held that this made an issue. The court held that the party who thus tendered the issue could not claim it was not an issue in the case. Many cases in the books illustrate the principle of thus creating an issue by an averment in the answer.

In *Price* v. *P. & F. H. Traction Co.*, 77 Mo. App. 236, 241, it was said that:

> **"If an omitted allegation be supplied by the pleadings of such adverse party, it is the same as if it were inserted in the party's own pleading."**

In *Hefferman* v. *Supreme Council*, 40 Mo. App. 605, is was said:

> **"Where the answer thus supplements the petition how can the defendant claim the proof offered should not be received, it being strictly within the issues framed by the pleadings?"**

In *Bliss on Code Pleadings*, Section 437, it is said:

> **"It was a rule of common law pleading that an omission to state a material fact, either in a declaration or special plea might be supplied by the pleadings of the opposite party. Mr. Chitty calls**

it 'express aider.'" See 1 Chitty Pl. (16th Am. Ed) 703.

So in *Pendel* v. *Trevor,* 30 Ark, 247, the answer set out contracts unknown to the plaintiff who was relying upon other equities, and it was held that the decree in favor of plaintiff could be based upon the answer.

In *U. S.* v. *Morris,* 10 Wheaton, 246, 6 L. Ed. 314, it is said that " any omission in the pleading of one party can be aided by the pleadings of the other."

In *McMahon* v. *Pope,* 10 S. D. 300, 73 N. W. Rep. 77, 78, it was said:

> "The rule has right reasoning for a basis, and is well recognized both at common law and under the code system, that the omission to state a fact, however essential, is cured when supplied by the pleading of the opposite party."

Here the Wabash Company injected into the case the fact that the County Company had no complete right of way between the park and 18th street, and that the Kansas City Company could not have its own right of way subjected to the use desired, the averment being (Rec. 173-174) that it

> "* * proceeded to acquire from the then owners thereof, at its own expense, by purchase or condemnation, a right of way through all the remaining and intermediate lots, in such manner as gave said company a continuous right of way sufficient for the construction and operation of its railroad from said north line of said park to Tayon avenue in said city."

So the answer (Rec. 175) averred that "the right of way and real estate outside of said park subsequently acquired by said * * Kansas City * * Company by pur-

chase and condemnation as aforesaid" was not bound by the contract.

VII.

THE WABASH COMPANY HAS AT ALL TIMES CONSTRUED THE RIGHT OF THE COLORADO COMPANY TO BE TO THE USE OF THE ENTIRE RAILROAD PROPERTY, REGARDLESS OF WIDTH, AND IS NOW ESTOPPED TO CLAIM TO THE CONTRARY.

The entry of a decree like that in the Main Case is illustrative of one of Mr. Justice Brewer's (*Chicago, etc., R. Co.* v. *U. P. R. Co.*, 47 Fed. Rep. 15 26) greatest statements:

> "* * * that the powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature, and do justice to every individual."

The character and nature of this decree is thus described in the opinion (Rec. 308-309; 29 Fed. Rep. 549-558) upon which it was based:

> "An act of the Legislature might be passed, giving to one company the right to use the tracks of another, and prescribing all the terms and conditions, the details for its use. I take it, an act of the Legislature would also be valid which simply declared that one company should have the right to use the tracks of another upon such terms and

conditions as the parties might agree upon, or should be prescribed by the courts; and if such a legislative act would have to be adjudged valid and complete, I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and determining the right, also settle and prescribe the terms of the use. It is true that such a decree cannot be executed by the performance of a single act, it is continuous in its operation; it requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore in a qualified sense, it may be true, that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of repeated inquiry, by proceedings in the nature of contempt. It is also true, that in the changing conditions of business, the details of the use may require change. The time may come, when the respondent's business may demand the entire use of its tracks, and the intervenor's right wholly cease. But other decrees are subject to modification and change, as in decrees for alimony, the courts are not infrequently called to modify them by reason of the changed condition of the parties thereto. So, when a decree passes, in a case of this kind, it remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification, upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill, and judgment of the officers of the respondent corporation, the contract in terms provides, that the regulation of the running of trains shall be subject to the control of the officers of the respondent. While I concede that there is force in the objection that this must remain, in a qualified sense, a continuing case in the courts, with the constant duty of supervising the acts of the respondent, yet

> it seems to me, that where there is a right, there must be a remedy, and that the mere machinery of court procedure is flexible enough to adapt itself to the necessities of protecting a right."

It is therefore manifest, that the very nature of the decree is such that action by the parties was as constantly required as it would have been under an executory contract. The decree, after all, was but evidence of the contract between the parties, and there is every reason to say that the action of the parties thereunder is as binding as if it had been a contract not evidenced by a decree; and it is manifest that the very nature of the decree is such that the action of the parties for years thereunder in exact accordance with their construction at the original trial must have great weight in determining its meaning. However, if, as the trial judge in this case said, the Wabash Company could not by any act upon its part change the meaning of it, yet it could so act as to estop itself from making the claim now set forth in limiting the words used therein. That it has so done will appear from the suggestions about to be made.

(a) All the property and terminal facilities between the north line of Forest Park and Eighteenth street were, at the instance of the Wabash Company, as heretofore seen, *valued as a railroad,* and the Colorado Company was required to pay as a fixed rental one-half of six per cent thereon, or twenty-five hundred dollars per month, together with its proportion of the taxes and maintenance upon a wheelage basis. (Decree, Rec. 293-295).

(b) Upon this valuation of *the whole property,* the fixed rental has been paid (Rec. 26-27, par. 13) by the

Colorado Company to the Wabash Company, which now claims the Colorado Company has only the right to a limited use of a part of the property.

(c) The Colorado Company during all these years paid upon a wheelage basis, as fixed in the decree, its proportion of the taxes upon the *whole* property (Rec. 25-26 par. 11).

(d) As to all the property except the tracks leading to private industries, as to which the matter was left open to proof, the parties stipulated (Rec. 26, par. 12) and one of the chief officers of the Wabash Company, Mr. Pryor, testified (Rec. 510-511, XQ. 10, 14-24), that during all these years the Colorado Company paid upon the wheelage basis, as fixed in the decree, its proportion of the cost of maintenance and repairs of all the property, including the Ewing avenue yards. So the petition in the Luke case showed (Rec. 440-475).

(e) As to the industrial tracks, *i. e.* the tracks leading to private industries, the parties failed to agree (Rec. 26-27, par. 12-14). These industrial tracks were (Rec. 27, par. 14) constructed under a form of contract (Rec. 313), by which the industry paid in full for the cost of everything excepting rails, switches, frogs, bolts and splices, and as to those the industry paid in in the form of six per cent interest upon the cost. The industrial tracks there at the time of the decree were ten in number, and of course included in the valuation upon which the fixed rental has been paid. Many records of the Wabash Company cannot be found (Evidence Tait, Rec. 528, XQ 1-2), so that it has been difficult to obtain a complete record, but everything appears to show that, although collecting the cost from the industry,

the Wabash Company has also collected the same upon the basis fixed in the decree, from the Colorado Company, thus recognizing that the latter had the right to the use thereof. It is at least fair to presume that whenever the industry did not pay the Colorado Company was charged or whenever the Wabash Company paid anything, the Colorado Company paid its part.

The side-tracks are shown by Exhibit D. (Rec. 27, par. 14) These are only mentioned because they were as between the parties treated just as were the industrial tracks thus showing how the parties viewed their rights. The side-tracks which were in the yards at the time the old decree was rendered, are shown by the testimony of A. S. Haynes, and by his Exhibit 2 (see Depositions and Second Partial Agreed Statement of Facts, Rec. 13-14). This exhibit gives the number of feet in each track, and adding all together, makes the total of 20,396 feet of side track in the yards, while the side-tracks now in the yards measure 23,265 feet, according to the scale upon Exhibit D, making 2,869 more feet of side-track now in the yards than there were at the time of the decree. An examination of Exhibit 2 of Haynes' testimony (Rec. 345) shows that there were at the time of the decree 17 side-tracks in the yards, consisting of 3 in Compton Avenue yards, 6 in Summit, or Ewing, Avenue yards, 7 in 22d Street yards and 1 cross-over track. An examination of Exhibit D shows that there are now in the yards 26 tracks, consisting of 11 in 22d Street yards, as against 7 at the time of the decree; 6 in Summit, or Ewing Avenue yards; 8 in Compton Avenue yards, as against 3 at the time of the decree, and 1 cross-over track, making in all now in the yards 9 more side-tracks

than there were at the time of the decree. The Wabash Company in five instances constructed new side-tracks in the yards (see Depositions and Second Partial Agreed Statement of Facts 352-358, par. 8, 9, 14, 15, 22.) In each of these instances the plural is used, so that in each instance at least two tracks must have been constructed, and as there were five instances, this makes not less than ten tracks in all. As there are but nine more tracks now in these yards than at the time of the decree, it is fair to assume that the Colorado Company assisted in the construction of all.

(f) An examination of Exhibit 2 of Haynes' testimony (Rec. 345) shows (see *infra* g) that there are now, as shown by Exhibit D, (Rec. 592) in existence 72 industrial tracks. Of these the Colorado Company contributed to the construction in instances where the contribution is shown (*infra* g) by the use of the name of the industrial track in thirty-six instances. The Colorado Company was charged with repair of eleven other tracks, where the name of the industrial track was used. In eight instances the Colorado Company was charged with the construction of side-tracks not shown to be in the yards, yet omitting the name of the industry to which the track led. The plural was used in each of these instances, so in the eight instances there must have been at least two tracks in each instance, making a total of 16 tracks. Thus, as shown, the Colorado Company has contributed to the construction or repair of 63 out of a possible total of 72 industrial tracks, many of which were included in the valuation fixed by the "Old Decree."

The contribution of the Colorado Company to the cost of the side-tracks is indicated by the testimony of

Haynes (Rec. 328-329), that all rail under seventy pounds went into the side and industrial tracks, which is shown by Exhibit 3 (Rec. 345-347) of his testimony. Many miles were charged to the Colorado Company. So there was other testimony offered that low switches and certain other material were charged, which alone went into side and industrial tracks (Deposition of B. F. Taylor, Rec. 320-326; A. S. Haynes, Rec. 328-333; Michael Hines, Rec. 333-336; Warner Decker, Rec. 336-338, Second Partial Agreed Statement of Facts, Rec. 347-360); but as to these last matters there is some dispute, and it is unnecessary to lay any special stress thereon.

(g) There is now tabulated a number of instances affirmatively shown by the record where contribution was made by the Colorado Company to the construction and maintenance of *industrial* tracks alone:

1. Ehlermann track:

This track was constructed prior to January, 1887, between 21st and 22nd Streets, and appears on plat, Exhibit D.

2. Collier track:

This track was constructed prior to January, 1887, between 22d and 23d Streets. (See Exhibit D.)

3. St. Louis Car Wheel Co. track:

(a) This track was constructed prior to January, 1887 (See said Exhibit D,) between Prospect and Spring Avenues.

(b) It was repaired in May, 1891. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 584), memorandum 5, of Tait's Exhibit "5."

4. Hydraulic Press Brick Co. track (1):

(a) This track was constructed prior to January, 1887. (See said Exhibit D), between Prospect and Spring Avenue.

(b) It was repaired in April, 1890. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 583), memo. 3, of Tait's Exhibit "5."

(c) It was also repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 355), subdivision 16.

5. Hydraulic Press Brick Co. track (2):

(a) This track was constructed prior to January 1, 1887, between Prospect and Spring Avenues. (Exhibit D.)

(b) This track was repaired in April, 1890. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 583), memo. 3 of Tait's Exhibit "5."

(c) It was also repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 355, subdivision 16.)

6. Hydraulic Press Brick Co. track (3):

(a) This track was constructed prior to January 1, 1887 (see said Exhibit D), between Prospect and Spring Avenues.

(b) This track was repaired in April, 1890. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 583) memo. 3 of Tait's Exhibit "5."

(c) It was also repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 255, subdivision 16.)

7. Hydraulic Press Company track (4):

(a) This track was constructed prior to January 1, 1887 (see Exhibit D), between Spring and Prospect Avenues.

(b) This track was repaired in April, 1890. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 583), memorandum 3 of Tait's Exhibit "5."

(c) It was also repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 355, subdivision 16).

8. Shovel Works track:

(a) This track was constructed prior to January 1, 1887 (see Exhibit D), between Manchester Avenue and Sarah Street.

(b) In June, 1891, this track was relaid and extended. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 350, subdivision 4),

9. Hoyt Metal Co. track:

(a) This track was constructed prior to January, 1887 (see Exhibit D), between Sarah Street and Boyle Avenue.

(b) It was extended in March, 1893. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 353, subdivision 10).

(c) It was extended again and repaired in August, 1893. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 584), memo. 7 of Tait's Exhibit "5."

10. Old Mike Foerstel track:

This track was constructed prior to January, 1887 (see Exhibit D), immediately east of Boyle Avenue.

11. Maguire Coal Co. track (1):

This track was constructed in January, 1889. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 348, subdivision 1); also depositions of Wabash Railroad Company (Rec. 582), subdivision 1 of Tait's Exhibit "4."

12. Maguire Coal Co. track (2):

This track was constructed in July, 1889. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 349, subdivision 2).

13. Reitz Cut track:

This track was constructed in October, 1895. The Colorado Company paid its proportion of the cost of the labor thereof. See Depositions of Wabash Railroad Company (Rec. 564).

15. Harrison-Berry Co. track:

(a) This track was constructed in November, 1896. The Colorado Company paid its proportion of the cost of the labor thereof. See Depositions of Wabash Railroad Company (Rec. 565), Tait's Exhibit "1."

(b) It was extended and connected with the Pacific Warehouse Co. track in November, 1896. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 356, subdivision 19); also Depositions of Wabash Railroad Company (Rec. 578), subdivision 13, Tait's Exhibit "4."

16. Heinrich Coal Co. tracks (9):

(a) These tracks were constructed at different times. The Colorado Company paid its proportion of

the cost thereof. See Depositions of Wabash Railroad Company (Rec. 82, 84, 90-91, 93, 96, 97).

(b) These tracks were relaid in January, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 586), Memo. 10 of Tait's Exhibit "5."

17. Gilsonite R. & P. Co. track:

This track was constructed in December, 1899. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company (Rec. 83). Tait's Exhibit "1."

18. Polar Wave Ice Co. track (1):

(a) This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company (Rec. 83, 84), Tait's Exhibit "1.", also p. 585 of said depositions, memo. 9 of Tait's Exhibit "5."

19. Polar Wave Ice Co. track (2):

This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company, pp. 567, 568 and 569, Tait's Exhibit "1;" also p. 585 of said depositions, memo. 9 of Tait's Exhibit "5."

20. Polar Wave Ice Co. track (3):

This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company, pp. 567, 568 and 569, Tait's Exhibit "1;" also p. 585 of said depositions, memo. 9 of Tait's Exhibit "5."

21. Polar Wave Ice Co. track (4):

This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company, pp. 567, 568 and 569,Tait's Exhibit "1;" also p. 585 of said depositions, memo. 9 of Tait's Exhibit "5."

22. Polar Wave Ice Co. track (5):

This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company, pp. 567, 568 and 569, Tait's Exhibit "1;" also p. 585 of said depositions, memo. 9, of Tait's Exhibit "5."

23. Empire Brewing Co. track:

This track was constructed in March, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company. p. 586, memo. 10 of Tait's Exhibit "5."

24. Lumber Co. track:

This track was constructed in May, 1889. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 582, memo. 1 of Tait's Exhibit "5."

25. M. C. P. & C. track (1):

(a) This track was extended and the grade thereof lowered in April, 1891. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 349, subdivision 3.

(b) It was repaired in May, 1891, and the Colorado Company paid its proportion of the cost thereof. See Deposition of Wabash Railroad Company, p. 584, memo. 5 of Tait's Exhibit "5."

(c) It was again extended in August, 1893, and the Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, subdivision 7 of Tait's Exhibit "5."

(d) This track was repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

26. Mound City P. & C. Co. track:

(a) This track was extended and the grade thereof lowered in April, 1891. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 349, subdivision 3.

(b) In February, 1895, it was repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

27. Hay Exchange track (1):

(a) This track was extended and repaired in August, 1893. The Colorado Company paid its properton of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, memo. of Tait's Exhibit "5."

(b) It was extended in November, 1896, and the Colorado Company paid its proportion of the cost thereof. See Depositions and second Partial Agreed Statement of Facts, p. 356, subdivision 19.

28. Hay Exchange track (2):

(a) This track was extended and repaired in August, 1893. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, memo. 7 of Tait's Exhibit "5."

(b) This track was extended in November, 1896. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 356, subdivision 19.

29. Hay Exchange track (3):

(a) This track was extended and repaired in August 1893. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, memo. 7 of Tait's Exhibit "5."

(b) This track was extended in November, 1896. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 356, subdivision 19.

30. Pacific Warehouse Co. track:

In November, 1896, this track was connected with the Harrison-Berry track. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 356, subdivision 19.

31. Donk Bros. Coal Co. track (1):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

32. Donk Bros. Coal Co. track (2):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See subdivision 16 on p. 355 of Depositions and Second Partial Agreed Statement of Facts.

(b) In January 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

33. Donk Bros. Coal Co. track (3):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

34. Donk Bros. Coal Co. track (4):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

35. Donk Bros. Coal Co. track (5):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

36. Donk Bros. Coal Co. track (6):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

37. Logwood De Camp Co. track (1):

(a) This track was repaired in January, 1898. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, pp. 358-359, subdivision 23.

(b) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

38. Logwood De Camp track (2):

(a) This track was repaired in January, 1898. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, pp. 358-359, subdivision 23.

(b) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof.

See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

39. Logwood De Camp track (3):

(a) This track was repaired in January, 1898. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, pp. 358-359, subdivision 23.

(b) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

40. American Pressed Brick Co. track:

This track was repaired in September, 1898. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 359, subdivision 24.

41. Tamm's Switch:

This track was repaired in May, 1891. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, memo. 5 of Tait's Exhibit "5."

42. Scruggs-McClure Co. track:

This track was extended in December, 1899. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 580, subdivision 21 of Tait's Exhibit "4."

Some claim is made that material was not paid for. It was paid by the industry (Rec. 313). The accounts were so kept that it cannot be told what material was charged for (Rec. 347-433).

(h) Some confusion is created by a reference in the Record to the services charged for switching, which has no relation to the rental paid or the cost of maintaining the property. The Colorado Company had no switch engines or cars, and the Wabash Company did this work for it for hire (Rec. 27, par. 15.) Mr. Magee says (Rec. 514-515), and Mr. Emerson denies (Rec. 489-490), that this work was done under a verbal agreement, to be paid for in proportion to the number of cars switched, no matter whether the switching was done on the main, side or industrial tracks, which was different from the decree, where the wheelage was according to the wheels passed over the main track or parts thereof. While Mr. Magee says that the maintenance for the terminals was to be charged under this arrangement, this was contrary to the agreed statement of facts (Rec. 26, par. 12) and the way in which the accounts were kept. (Evidence Pryor, Auditor and Assistant to the President of the Wabash Company, Rec. 516-517).

The petitions and accounts set forth in the intervention of the Wabash Company in the receivership of the Colorado Company (Rec. 440-475) shows that the maintenance of the entire property was charged under the decree, on the ground (Rec. 445) that the Colorado Company had been continuously and jointly using with intervenor *"the right of way, tracks, side tracks, switches, turnouts, turntables, shops and other terminal facilities* as aforesaid, formerly owned by said Wabash, St. Louis & Pacific Railway Company, but now the property of intervenor."

Certain it is that the Wabash Compay never *paid* anything upon account of an industrial track that it

did not charge the Colorado Company its proportionate share.

Respectfully submitted.

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN.
Solicitors for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY.
Petitioner,

vs.

THE WABASH RAILROAD COMPANY AND THE CITY OF ST. LOUIS.
Respondents.

PETITION FOR CERTIORARI.

Now comes the St. Louis, Kansas City & Colorado Railroad Company, herein called the Colorado Company, and respectfully petitions this court to grant a writ of certiorari to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the case therein pending, numbered 2788, wherein the petitioner is appellant and the Wabash Railroad Company and the City of St. Louis are appellees, a copy of the record being presented herewith, the sole question involved therein being whether under a decree, entered by Mr. Justice Brewer upon the Circuit (29 Fed. Rep., 546), and affirmed here

(138 U. S., 1), the Colorado Company is entitled to the use of certain tracks of the Wabash Company leading to private industries located in St. Louis, Mo.

Thereupon petitioner respectfully shows:

1. *Cause pending below and sought to be certified.*

(*a*) The petitioner as an intervenor in a cause pending below, there sought to enforce (Petition, Rec. 3-13) a decree (Rec. 4-7) in its favor entered by Mr. Justice, then Circuit Judge Brewer in the United States Circuit Court for the Eastern District of Missouri, December 31, 1886 (29 Fed. Rep., 546), afterwards affirmed here (*St. Louis* v. *Joy*, 138 U. S., 1), against the Wabash Railroad Company requiring the latter to accord to intervenor the equal use of its entire "right of way, tracks, side-tracks, switches, turnouts, turntables and other terminal facilities" in St. Louis between the north line of Forest Park and 18th street, the court having, upon the insistence of the Wabash Company, held that the compensation previously fixed by the master should be increased because the Colorado Company, by virtue of the decree, obtained the right to the use of *all* the terminals, including the industrial tracks in question.

(*b*) The answer (Petition Rec. 10.11, Par. 10. Answer Rec. 17, Par. 10) of the Wabash Company to this intervention was that while the Colorado Company could use all the property, it could make use of same only for through uninterrupted passage. After an extended trial (Rec. 23-592) a decree (Rec. 593, 594, 597) was entered upon this petition for enforcement denying the claim of the Wabash Company, but *limiting* the use of the intervenor under the decree to that part only of the right of way upon a strip 42 feet wide through Forest Park and 28 to 30 feet wide from the Park to 18th street, the opinion of the trial judge (144 Fed. Rep., 476) being that neither Mr. Justice Brewer, who entered the original decree, nor this court in affirming the same, intended their *general* language giving to intervenor the equal use

of the *entire* right of way and *all* terminal facilities, to apply to more than such narrow strip and *part* thereof.

(*c*) An appeal was then taken to the Circuit Court of Appeals for the Eighth Circuit, to which, in the absence of a jurisdictional or constitutional question the case had to go (*Mason* v. *Pewabic Mining Co.*, 153 U. S., 361, 38 L. Ed., 745) which reversed (Rec. 595) and remanded the case "with instructions to render a decree not inconsistent with the views" expressed in the opinion of Judge Sanborn (Rec. 601-621, 152 Fed. Rep., 849-856), that the intervenor was entitled to the equal use of the *entire* strip of land between the east line of the Park and 18th street *owned* by the Wabash Company and *all* terminal facilities thereon, but was "not entitled to the use * * * of any * * * industrial or railway facilities of the Wabash Company" *not on the strip so owned*, a limitation never before suggested by anyone. Judge Hook dissented (Rec. 620, 621, 152 Fed. Rep., 863) from this exception, but concurred in the rest of the opinion. This being a decree of reversal where private interests were involved and not one which was final, the case could not have *then* been brought here by certiorari (*C. & N. W. R. Co.* v. *Osborne*, 146 U. S., 354, 36 L. Ed., 1002; *Forsythe* v. *Hammond*, 166 U. S., 506, 574, 41 L. Ed., 1095, 1098; *Taylor* v. *Louisville, etc., R. Co.*, 172 U. S., 648, 43 L. Ed., 1182) nor by appeal (*MacLeod* v. *Graven*, 79 Fed. Rep., 84; *Lubin* v. *Edison*, 195 U. S., 624, 49 L. Ed., 349) so intervenor was remediless until a new decree was entered.

(*d*) When the mandate (Rec. 593, 595) reached the Circuit Court, intervenor by leave of court and *consent* of parties (Rec. 597) filed an amendment to its petition setting up the action aforesaid, the mandate of the Circuit Court of Appeals and averring that neither the Circuit Court of Appeals nor the Circuit Court had any right to exclude it from the use of the industrial tracks of the Wabash Company beyond the limits of the land owned by it, and to enter a decree so doing would fail to give full faith and credit to

one entered by Mr. Justice Brewer and the mandate of affirmance from this court, all contrary to sections 1 and 2 of article III, and article VI, of the Constitution of the United States, it having been said in *Embry* v. *Palmer,* 107 U. S., 9, 27 L. Ed., 346, 349, that these sections required to be accorded to a decree of a federal court the same full faith that must be given under section 1, article IV, to one of the state courts.

(*e*) The Circuit Court then entered a new decree (Rec. 625, 626) giving intervenor the use of all the property upon the land *owned* by the Wabash Company between Forest Park and 18th street, but excluded it from the use of its industrial tracks between said points on land not so owned, holding that if the industrial tracks were between such points and owned and used by the Wabash Company, yet not located upon land owned by the company, they were not then within the benefit of the decree. From this decree an appeal (Rec. 626) was taken to the Circuit Court of Appeals, where a motion has been filed by appellee to dismiss it because, it being a second appeal to the same court, the former opinion is the law of the case and the merits cannot there be inquired into (*Stewart* v. *Salamon,* 97 U. S., 361). However, upon an application here for a writ of certiorari the rule of *Stewart* v. *Salamon* has been expressly held to have no application (*Panama* v. *Napier Shipping Co.,* 166 U. S., 280, 41 L. Ed., 1004, 1005). Instead of this being a reason for refusing to grant the writ, it is one for granting it; otherwise the first decision of the Circuit Court of Appeals having been one of reversal, the case could not have been brought from that court here by certiorari, appeal or any other means, and an application of the rule of *Stewart* v. *Salamon* would create a situation where this court could not construe its own decree, though practically nullified by a decision of an inferior court.

(*f*) An appeal was also taken directly to this court (No. 253 October term, 1908) upon the ground that full faith and credit had not been given to its decree as required by sections 1 and 2, of article III, of the Constitution. There being doubt as

to which appeal should be prosecuted, this court being the one which should finally decide the case, the safe course to adopt is to follow the practice pursued in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S., 138, 43 L. Ed., 108, 111, 112, and now granting this petition, hear both appeals at the same time.

2. *Reasons for granting this petition.*

(*a*) Vast property interests are involved. The right of a great railroad to reach the enormous private industries in the center of a great city is a matter of the utmost concern. Moreover, here there was an absolute failure by the Circuit Court to recognize and it refused to carry out the express mandate of this court (138 U. S., 1), affirming the decree of Mr. Justice Brewer, and directing (Rec. 25) it "to carry out" same.

(*b*) The master, to whom the cause was originally referred, fixed the full compensation to be paid for the use of the property at six per cent interest upon a valuation of $1,000,000, to be divided between the two roads upon a wheelage basis (Rec. 144, 145). Exceptions were filed by the Wabash Company to this part of the report (Exceptions XI and XII, Rec. 232, 233) and sustained by Mr. Justice Brewer (29 Fed., 546, 559, Rec. 310, 311), who rejected the division made by the master on a wheelage basis and charged the intervenor with the full value of the full half of the use because it obtained an equal right with the Wabash Company of the entire right of way, *including the access to the various private industries along the line*, and equal competition upon equal terms for their business. Upon appeal here by the Wabash Company it was contended (138 U. S., 25, 29, Rec. 29) that the Circuit Court erred in decreeing that a contract giving the use of the *right of way* was sufficient to give the right among other things to use these side-tracks, switches and other terminal facilities. This court denied the contention, saying that as the lower court adopted its theory as to the compensation upon the insistence of the Wabash

Company, the latter could not complain. Ever since December 31, 1886, the Colorado Company has paid (Rec. 26) the rental thus fixed, and up to May 7, 1902 (Petition, Rec. 10, Answer, Rec. 15), no question was ever raised as to its having the equal right to the use of all the terminal facilities, including the industrial tracks; never before the suggestion by the Circuit Court of Appeals was there a pretense that the industrial tracks could not be used. It would, therefore, seem that it is not only the right, but the duty of this court to see to it that a party cannot for over fifteen years use its decree to its own advantage and then at will reject all its burdens.

(*c*) The industrial tracks from the use of which appellant is now excluded are owned by the Wabash Company. They lead from its main track upon the strip of land owned by it to private industries in the vicinity. They were constructed upon the lands of the industries under contracts (Rec. 27, 313) between the latter and the Wabash Company, by which the industries furnished the land and paid the cost of construction, except the materials upon the value of which they paid six per cent annual interest. The value of these industrial tracks so owned by the Wabash Company, though located upon the lands of others, was included in the valuation, interest upon which was fixed as the rental to be paid by the Colorado Company. In most, if not all instances, the Colorado Company was charged with had paid its proportion under the decree, of the cost of maintaining these tracks, and when any such new tracks were put in the Wabash in addition to collecting from the private industry, collected from the Colorado Company its proportion upon the wheelage basis. It was after more than fifteen years' use under the decree that the claim was made of any limitation in the right of intervenor. So for this reason also, it would seem that it is not only the right, but the duty of this court to see for itself that one of the litigants cannot abuse the terms of its own decree. No other court can so intelligently decide what the decree

means; surely upon such a question the decision of no lower court should be final.

(*d*) A brief in support hereof is attached hereto, reference to which is made as fully as if incorporated herein.

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN,
Solicitors for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The petition below, rather than mandamus here, was the proper method for the enforcement of the decree of December 31, 1886.

(*a*) The decree (Rec. 4-7) sought to be enforced was that of the Circuit Court, which had been affirmed here (138 U. S., 1), the parties stipulating (Rec. 25, paragraph 10) that this court "* * * issued its mandate of affirmance to the lower court *directing it to carry out its decree.*" It is, therefore, the decree of this court which is sought to be enforced.

(*b*) The enforcement of a decree of this court can be through original proceedings in mandamus instituted and carried on here. Where, however, there is likely to be an issue of fact presented, as was the case here, the approved method is to present the application to the Circuit Court by petition or motion and then take the case up by appeal (*Perkins* v. *Fourniquet,* 14 How., 328, 330, 14 L. Ed., 441, 442; *In re Washington, etc., R. Co.,* 140 U. S., 91, 95, 96, 35 L. Ed., 339, 341; *City National Bank* v. *Hunter,* 152 U. S., 512, 38 L. Ed., 534).

Indeed, in such case, this court in the exercise of a wise discretion, could decline to entertain mandamus and require the parties to first present their complaint to the lower court.

II.

Such a proceeding made necessary an appeal first to the Circuit Court of Appeals, though the decree sought to be enforced was the decree of this court.

After the rendition of the decree sought to be enforced, and before the filing of the petition to enforce it, the Circuit Court of Appeals was established, so that in the absence of a constitutional or jurisdictional question, the case had to be appealed to that court, (*Mason* v. *Pewabic Mining Co.,* 153 U. S., 361, 38 L. Ed., 745), whose judgment in case of a final decree would, for the purpose of review here, have been final and only reviewable by certiorari. This because no constitutional question having been raised, the jurisdiction as to intervenor was to be determined by that of the main cause, which jurisdiction had been invoked because of diverse citizenship (*Gregory* v. *Van,* 160 U. S., 643, 40 L. Ed., 566; *Carey* v. *R. Co.,* 161 U. S., 115, 40 L. Ed., 638; *Rouse* v. *Hornsby,* 161 U. S., 583, 40 L. Ed., 817; *Pope* v. *L. & N. R. Co.,* 173 U. S., 173, 43 L. Ed., 814). Hence the strange situation arose of that court being the final appellate tribunal to finally determine what the decree of this court meant. So when the Circuit Court decreed (144 Fed. Rep., 476, Rec. 598, 599) that the rights of the Colorado Company were limited to that part of the Wabash right of way located upon a 30-foot strip, the appeal was taken to the Circuit Court of Appeals, which unanimously reversed that decree and remanded the cause for further proceedings, but by a divided court held (majority opinion of Judge Sanborn, Rec. 601, 620, 152 Fed. Rep., 849-863; minority opinion by Judge Hook, Rec. 620, 621, 152 Fed., 863, 864) that there could be no use of the industrial tracks owned but not located upon land owned by the Wabash Company, a limitation never thought of or suggested by anyone before.

III.

There was no method by which the decree of the Circuit Court of Appeals could be reviewed.

The majority opinion (Rec. 601, 619-620, 152 Fed. Rep., 849, 863) said:

"The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and 18th street which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side-tracks, turn-outs, turntables and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company beyond the limits of that strip. *Union Pacific R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 171, 26 Sup. Ct. 19, 50 L. Ed., 134.

The question whether or not equity demands the decree in this case to be conditioned by the requirement that the Colorado Company shall henceforth pay, in addition to the amount specified in the decree of 1886, 6 per cent per annum upon one-half of the cost or value of the improvements which the Wabash Company has placed upon this right of way since 1886 or by any other requirement and questions pertinent to an accounting between the parties have not been considered, because there is no cross-appeal, and this decision does not foreclose the consideration and determination of these issues, if any, by the court below previous to the entry of its decree. *Guarantee Co.* v. *Phenix Ins. Co.*, 59 C. C. A., 376, 124 Fed., 170.

The decree below is reversed, and the case is remanded to the Circuit Court with instructions to render a decree not inconsistent with the views expressed in this opinion."

This, then, being a decree of reversal, was not final, so that this court would not *then* take jurisdiction by certiorari, the controversy being between private parties (*C. & N. W. R. Co.* v. *Osborne*, 146 U. S., 354, 36 L. Ed., 1002; *Forsythe* v. *Hammond*, 166 U. S., 506-574, 41 L. Ed., 1095, 1098; *Taylor* v. *Louisville, etc., R. Co.*, 172 U. S., 648, 43 L. Ed., 1182), and for the same reasons had the cause been otherwise appealable here this court would not have entertained jurisdiction (*MacLeod* v. *Graven*, 79 Fed. Rep., 84; *Lubin* v. *Edison*, 195 U. S., 624, 49 L. Ed., 349).

IV.

The decision of the Circuit Court of Appeals brought into the case a constitutional question.

Inasmuch as the Circuit Court of Appeals for the *first* time,

without any claim of the Wabash Company to that effect, decided that the intervenors were not entitled to the use of the industrial tracks and remanded the cause for a new trial upon that theory, intervenors decided to file an amendment and invoke jurisdiction upon the ground that to enter such a decree they were deprived of a constitutional right. So by leave of court and consent of parties (Rec. 597) this order was made:

"By consent of parties it is ordered that said intervenor have leave to file its amendment to its intervening petition as this day presented, which is accordingly done."

The amendment was duly filed (Rec. 597-600) and contained a history of the proceedings, averring that to enter, as decided upon its own suggestion by the Circuit Court of Appeals, a decree excluding intervenors from the use of the industrial tracks would not give full faith and credit to a decree of this court, as required by the provisions of the Constitution (Art. III, Secs. 1 and 2; Art. VI). It is true that section 1, article IV, provides that "full faith and credit shall be given in each *state* to the public acts, records and judicial proceedings of every other *state*." This technically only relates to the proceedings of the state courts, yet coupled with others, regarding the extent of the judicial power of the United States, it is not stretching the spirit of that instrument if it requires one federal court to give full faith to proceedings in another. So in *Embry* v. *Palmer*, 107 U. S., 9, 27 L. Ed., 346, 348, 349, Mr. Justice Matthews said:

"So far as this statutory provision relates to the effect to be given to the judicial proceedings of the state, it is founded on Article IV, Section 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Con-

stitution. As part of its general authority, the power to give effect to the judgments of its courts is co-extensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right which the Constitution has given to Congress of exclusive legislation over the district. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the states, wherever rendered and wherever sought to be enforced. * * *"

If, as section 1 of article III of the Constitution provides, all federal courts but this are *inferior* it is manifest that no system of laws can exist which will permit an inferior court by construction to impair the effect of a decree here rendered, or deprive a party of the right to have *this* court finally say what its decree means. So whether attempted to be done by legislation or judicial decision, the Constitution will not permit to become final, a construction of an inferior court of a decree of the Supreme Court, As said by Mr. Justice Brewer (*Leadville Coal Co.* v. *McCreery,* 141 U. S., 475, 35 L. Ed., 824, 825, 826):

"It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree, and disturb all rights once definitely determined."

V.

Decree entered upon mandate from the Circuit Court of Appeals and appeals therefrom.

The Circuit Court entered the decree (Rec. 625, 626) in conformity with the opinion of the Circuit Court of Appeals. By excluding intervenor from the use of the industrial tracks full faith and credit was denied to a decree of this court. Doubtful as to the forum to which the case should be appealed, two appeals were taken, one to the Circuit Court of Appeals, which is now sought

to be removed by certiorari, and the other directly to this court, where it was filed January 17, 1908, and was regularly docketed as No. 253 at the October, 1908, term. The record is printed in both cases and is exactly the same. This course was pursued in *Burton* v. *U. S.*, 196 U. S., 283, 49 L. Ed., 482, and *Pierce* v. *Creecy*, 208 U. S., 616, 210 U. S., 387, so that this court would be in position to take jurisdiction either by certiorari or by direct appeal. In Burton's case the petition for certiorari was taken under advisement with the case here upon its merits and then denied. In Pierce's case it was denied because the writ of error to this court was clearly well taken. In *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S., 138, 43 L. Ed., 108, 111, 112, the petition was granted and both appeals heard at the same time. This because of doubt as to which appeal should be sustained.

VI.

The controversy as to whether an appeal lies here directly from the Circuit Court.

(*a*) Of course, if an appeal lies directly from the Circuit Court to this court, then there would be no necessity of one to the Circuit Court of Appeals, nor for this application. It might be an answer to this application to say that an appeal could be taken directly. If so, this court should say it in plain terms so that the question of jurisdiction would be forever settled. *Burton* v. *U. S.*, 196, 283, 49 L. Ed., 482, 486, presented a similar dilemma, so writs of error were sued out to the two courts. This court solved the problem by continuing the application for certiorari and hearing it with the argument of the case under direct review.

(*b*) Doubt as to the right of a direct appeal here arises because of the claim of the Wabash Company that no constitutional question arose in the case. If the failure of the lower court to give full faith and credit to the decree of this court was violative

of the Constitution, then a constitutional question has arisen which brings the whole case here for review, for if the question "be not frivolous" there is jurisdiction, as was decided in *Burton* v. *U. S.*, 196 U. S., 283, 49 L. Ed., 482, 485. Under the dicision in *Embry* v. *Palmer*, 107 U. S., 9, 27 L. Ed., 346, 348, 349, the question is not believed to be frivolous. Anyhow, this court should either by certiorari or direct appeal decide for itself the meaning of its own decree, for as said (*Leadville Coal Co.* v. *McCreery*, 141 U. S., 475, 35 L. Ed., 824, 825, 826) by Mr. Justice Brewer:

"It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree, and disturb all rights once definitely determined."

VII.

The motion of the Wabash Company in the Circuit Court of Appeals to dismiss the appeal renders necessary this application.

(*a*) The Wabash Company has filed in the Circuit Court of Appeals a motion to dismiss the last appeal because the former opinion is the law of the case, citing and relying upon *Stewart* v. *Salamon*, 97 U. S., 361, 24 L. Ed., 1044; *Humphrey* v. *Baker*, 103 U. S., 736; 26 L. Ed., 456; *Mackall* v. *Richards*, 116 U. S., 45, 29 L. Ed., 558; *U. S.* v. *New York Indians*, 173 U. S., 464, 43 L. Ed., 769, and *Southern B. & L. Assn.* v. *Carey*, 117 Fed. Rep., 325. The question thus presented to that court is in view of these decisions, no light one, for in *Stewart* v. *Salamon*, 97 U. S., 361, 24 L. Ed., 1044, 1045, Mr. Chief Justice Waite said:

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will,

upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. * * *"

(*b*) This doctrine, if sustained, and the case held not subject to review, would present an anomalous situation. The first decision of the Circuit Court of Appeals was not reviewable here because the decree being one of reversal, was not final. If the second decision must follow the first, that being the law of the case, the result is there can be no review upon appeal of the decree last entered. Thus an *inferior* court could finally decide the effect of a decree here rendered. Fortunately this court solved this problem in *Panama* v. *Napier Shipping Co.*, 166 U. S., 280, 41 L. Ed., 1004, 1005. Upon the first appeal from the decree (42 Fed. Rep., 922) the Circuit Court of Appeals reversed and remanded the cause (1 C. C. A., 576, 50 Fed. Rep., 557). Upon second appeal (9 C. C. A., 553, 61 Fed Rep., 408) there was an affirmance. Certiorari was then, after the second appeal, granted and the case reversed, this court holding that it was then in a position to review the whole case from its inception, and that the first decision of the case was not the law of the case. Mr. Justice Brown said:

"But while the Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court when in the exercise of its supervisory jurisdiction it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

It is, therefore, submitted that the simple solution of the matter is to remove the case here by certiorari.

Pullman's Palace Car Co. v. *Central Transportation Co.*, 171 U. S., 138, 43 L. Ed., 108, 111, 112, is express authority for the course sought to be pursued here. The facts were by the court thus stated:

"From this judgment the Pullman Company appealed directly to this court. It also appealed to the Circuit Court of Appeals. The case was there argued upon a motion to dismiss the appeal,

and the motion denied, and the further argument was postponed until some disposition was made of the appeal taken directly to this court. 39 U. S. App., 307. A motion has also been made to this court to dismiss the appeal, and thereupon an application was made to us for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and on account of the peculiar circumstances it was granted, and the record has been returned to this court by virtue of that writ."

Mr. Justice Peckham said:

"Counsel for the Pullman Company took the appeal directly from the Circuit Court to this court upon the theory that the case involved the construction or application of the Constitution of the United States, because of the holding of the court below that the cause of action alleged by the Central Company in its cross-bill was under the circumstances a proper subject of equitable cognizance, and counsel claimed it was really nothing but a legal cause of action in regard to which the cross defendant was entitled to a trial by jury under the Constitution of the United States. There being room for doubt in regard to the soundness of such contention, the counsel also took an appeal to the Circuit Court of Appeals, and we think that by this action he did waive any right of appeal which he would otherwise have had. Whichever route may be the correct one, either directly from the Circuit Court or through the Circuit Court of Appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by the writ of certiorari; and we therefore proceed to determine it upon the merits."

VIII.

Case upon the merits.

1. *The duty of this court.*

We briefly consider the merits of the case, so that one may see at a glance that the right asserted is not unfounded, and that having for sixteen years paid the rent required by the decree good faith requires that intervenor should now enjoy its benefits. No inferior court can finally deprive it of a right accorded by a decree here. As Mr. Justice Brewer, in *Leadville Coal Co.* v. *McCreery*, 141 U. S., 475, 35 L. Ed., 824, 825, 826, said:

"It would be an anomaly in legal proceedings if, after a court

with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree and disturb the rights once definitely fixed."

2. *The language of the original decree covers the industrial tracks.*

So far as general language could give it, the original decree (Rec. 4, 5) covers all the property of the Wabash Company between certain points by this describing it:

"The right of way and tracks, side-tracks, switches, turn-outs, turntables and other terminal facilities of said Wabash, St. Louis & Pacific Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis."

Unless, therefore, there is some strong reason for so doing, there cannot be excluded from this sweeping language the industrial tracks owned by the Wabash Company, although located upon land owned by the industries.

The opinion of Judge Sanborn in the Circuit Court of Appeals (Rec. 606, 152 Fed. Rep., 849, 852) exhaustively discussed this question in dealing with that part of the decree of the Circuit Court (144 Fed. Rep., 476) which limited the intervenor's use to a 30-foot strip of the right of way. He, among other things, said:

"To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel, the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and Eighteenth street. Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and, when the terms of a decree are plain and clear, their ordinary meaning and effect may not be lawfully contracted or extended, unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore, assumed no light burden when it essayed to prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only 30 feet in width out of the wider strip the Wabash Company owned between the east line of the park and Eighteenth street."

3. *Diverse views in the Circuit Court of Appeals.*

When, however, Judge Sanborn reached the close of his opinion (152 Fed. Rep., 863, Rec. 619) in excluding intervenor from the use of the industrial tracks, he simply said:

"The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side-tracks, turn-outs, turntables, and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial, or railway facilities of the Wabash Company beyond the limits of that strip. *Union Pacific R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 171, 26 Sup. Ct., 19, 50 L. Ed., 134."

No reason was given for this restriction other than that the learned judge regarded as controlling the decision of this court in *U. P. R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 160, 50 L. Ed., 134.

Judge Hook, in dissenting from this view (152 Fed. Rep., 863, 864, Rec. 620, 621) not only pointedly showed the error thereof, but also that the case relied upon had no bearing whatsoever upon the question. His language was:

"I concur in the reversal of the decree of the trial court, and also for the most part in what is said in the foregoing opinion. I do not, however, concur in the exclusion of the industrial tracks from the operation of the decree of 1886. These tracks are the usual and necessary features of railway terminals in a large city, and are as much a part thereof as the limbs are of a tree. They go with the right of way as appendages thereto, and are always so regarded. Their use is essential to the enjoyment of the rights awarded. In my opinion they are clearly within the spirit of the decree of 1886, and also by fair construction within its letter. The decree granted to the intervenor the 'right of way, tracks, switches, side-tracks, turn-outs, turntables, and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth Street in the city of St. Louis.' This is very broad language and it was repeatedly employed in the decree. That Judge Brewer intended to include such industrial tracks as were in existence when the decree was made also seems plain from his opinion (29 Fed., 559). The cost of their construction was in-

cluded in the total cost upon which the percentage compensation to be paid by the intervenor was based. Moreover, the consistent course of conduct of the parties for 13 years following the decree shows that they regarded them as being a part of the property the joint use of which was granted to the intervenor. I am unable to see any persuasive reason for excepting them from the comprehensive enumeration of terminal facilities in the decree. That they extend beyond the side lines of the strip of land owned by the Wabash Company and upon the land of others seems to me to be a circumstance wholly immaterial, and yet it must be the circumstance upon which their exclusion from the decree is made to depend. The Wabash Company owns these industrial tracks and operates them as part of its right of way and terminal facilities. Of what importance is it that they are in part upon public highways and the land of others under license instead of being wholly upon land owned by that company? If the latter condition existed, it would doubtless be conceded that they fell within the decree. The scope of the decree is, therefore, determined not by the character of the tracks and their relation to the right of way and terminal facilities as a whole with which the court was dealing but by the character of the title of the Wabash Company to the ground upon which the tracks are laid. It seems to me there has been a narrowing of the decree in this particular.

The case of the *Union Pacific Company* v. *Mason City Company*, 199 U. S., 160, 171, 26 Sup. Ct., 19, 50, L. Ed., 134, is not an authority for this construction of the decree. The court was there considering a claim of the Mason City Company for the use of the Union Pacific bridge across the Missouri River at Omaha, and its approaches. Naturally this would not include industrial tracks and switches. Indeed, when rightly regarded, the decision of the Supreme Court makes for a conclusion contrary to that reached by my associates. An act of Congress conferring in the most general terms upon other railroad companies the right to cross the bridge at Omaha was held to give the Mason City Company the right not only to cross the bridge, but to use several miles of main and passing tracks of the Union Pacific in the cities of Omaha and South Omaha. The decision well serves to illustrate the liberality with which provisions of the kind we are now discussing are construed when public interests are involved. Of course, the right to use industrial tracks laid since the decree of 1886 was rendered would require consideration of the subject of compensation. The compensation specified in the decree does not include them.

There are also some other observations near the close of the foregoing opinion which I think are not necessary to the con-

sideration of the case. They relate to conditions which it is conceded do not exist at present and which may never arise in the future. I do not wish to express or concur in any view concerning them until they arise and are presented for judgment in the usual way."

4. *By the original decree an increased compensation was required of the Colorado Company because it obtained the use of the industrial tracks.*

The master's report reviewed the evidence (Rec., pp. 140-145) and finally concluded (Rec., 144, 145) thus:

"Endeavoring to extract from the contradictory views and testimony on these points some basis which may be equitable, I think it would be proper to adopt as a basis the present value of the property sought to be used, to allow interest on this sum at the legal rate of interest in the State of Missouri, to-wit, six per cent to add to this the actual expenses of repairs and maintenance of the right of way and tracks, and the operating expenses of these tracks, and to divide the whole on a wheelage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, the Wabash road to keep an accurate account of such maintenance and operating expenses, and each road to keep an accurate account of the number of cars and locomotives run over said tracks by each, and settlement to be made every thirty days between the companies. For the purpose of ascertaining the amount of interest to be paid, I think, from all the testimony, that a fair valuation of the right of way and tracks sought to be and necessary to be used, should be fixed at $1,000,000.00."

In his report the master referred to testimony of the officers of the Wabash Company that the valuation to be fixed should include "the real estate and tracks and side-tracks laid thereon and other appurtenances necessary for doing business," and "that the reason the whole property should be taken in the value is that you cannot do business without the siding, switches, etc., for the purpose of storing, loading and unloading the cars."

The case was again referred for further testimony and the master the second time reported (Rec. 224):

"On the final hearing additional evidence was offered as to the proper measure of compensation and also as to the value of

the real estate occupied by the railroad from the north line of Forest Park to Eighteenth street. The testimony as to the value of the real estate does not include the superstructure or terminal facilities occupied by the Wabash, which the testimony of Mr. Talmage shows would be necessarily used if the intervenor had the right to use the Wabash tracks.

After due consideration of this new testimony, I am inclined to think that my original valuation of the track and right of way sought to be used, was equitable and proper under the circumstances."

To this report the Wabash Company filed exceptions (Exceptions XI and XII, Rec., 232, 233), the main complaint of which was that "the master erred in refusing to find that the measure of compensation and mode of ascertaining the same suggested by defendants and supported by the testimony of Mr. How, Mr. Talmage and other witnesses, is proper, equitable and just." That method, as already seen, was taking the railroad as a whole between the two points in question.

With these exceptions before him, Mr. Justice Brewer (Rec., 310, 29 Fed. Rep., 546, 559) said:

"The final matter is that of compensation. In this I think the Master erred. He fixed the value of the right of way at a million of dollars, and reported that, in his judgment, the share of the interest on this value and in the expenses of keeping up the track, which the intervenor company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed by the Master; but, in regard to the interest on the value, I think the intervenor should pay one-half of that, and for these reasons: It is a familiar fact, that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the carrier on one hand, the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, etc. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way

it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of its business, and it may share equally. Under those circumstances, it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence, I shall sustain the objections of the respondent to the report of the Master, so far as concerns the amount of compensation, and I think that the intervenor company must pay one-half the interest on the value and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects the report of the Master will be confirmed."

The decree then entered (Rec., 292, 296) so fixed the compensation.

In the Supreme Court it was (Rec., 29) by the Wabash Company contended:

"The contract only related to 'right of way;' the prayer of the petition was for the use of the 'right of way and tracks,' and the decree not only gives them the use of the 'right of way and tracks' but it subjects to the use of respondent the 'switches, sidetracks, turn-outs, turn-tables and other terminal facilities,' and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use."

In the report of the case (138 U. S., 1, 47, 48, 34 L. Ed., 843, 848) this argument is set forth though in somewhat condensed form. This court finally (138 U. S., 1, 47, 48, 34 L. Ed., 843, 858) said:

"The Circuit Court having adopted the rate of compensation insisted upon by the appellants, and the Colorado Company not having taken an appeal, the question of the rate of compensation is concluded between the parties."

It is perfectly clear, therefore, that the original decree intended to give the use of all the terminal facilities, including these industrial tracks. The testimony reported by the master (Rec. 140-145) clearly shows that Col. Talmage, then general manager of the Wabash Company, and Col. How, general agent of the receivers, based their valuation on the railroad as a whole, including the appurtenances and terminal facilities. At one place Mr. Talmage

(Rec. 224) is reported to have said that the valuation must be made of "the necessary terminals that must be used here in order to bring these trains in and prepare them to go out."

5. *The Wabash Company has always treated the industrial tracks as part of the property for the use of which the Colorado Company paid, and is now estopped to claim that they cannot be used.*

It is manifest that the very nature of the original decree was such that action by the parties was as constantly required as it would have been under an executory contract. The decree was but evidence of the contract between the parties, and it is manifest that its very nature is such that the action of the parties for years thereunder must have great weight in determining its meaning. While it is true that the Wabash Company could not by any act upon its part change its meaning, yet it could so act as to estop itself from making the claim now set forth in limiting the general words used therein. That up to the time of filing the intervening petition, all parties had acted upon the theory that there was a right to use the industrial tracks is plain from the suggestions now about to be made.

(*a*) All the property between the north line of Forest Park and Eighteenth Street was, at the request of the Wabash Company, by the report of the master (Rec. 140-145) valued as a railroad, and the Colorado Company was required to pay as a fixed rental one-half of 6 per cent thereon, or $2,500 a month, together with its proportion of the taxes and maintenance upon a wheelage basis (Decree, Rec., 292, 296). This fixed rental was for one-half of the use, while if it had been divided as the master originally reported, it would have been very much less (Rec., 433-439).

(*b*) Upon this valuation of the whole property the fixed rental has always been paid (Rec. 26, paragraph 13) by the

Colorado Company to the Wabash Company, which now claims that the decree gave no right to the use of the industrial tracks.

(*c*) The Colorado Company, during all these years, paid upon a wheelage basis as fixed in the decree its proportion of the taxes upon the whole property (Rec. 25, 26, paragraph 11), including the industrial tracks.

(*d*) As to all the property except the industrial tracks, as to which the matter was left open for proof, the parties stipulated (Rec. 26, paragraph 12) that the Colorado Company paid its proportion of the cost and maintenance of all the property under the terms of the decree.

(*e*) As to the tracks leading to private industries, the parties failed to agree (Rec. 26, 27, paragraph 14), leaving the matter open for proof.

(*f*) On account of many of the books and papers of the Wabash Company having been burned (Ev. Tait, Rec. 528, X-Q. 1, 2) it was an impossibility to obtain a complete statement as to the Colorado Company's contribution to the maintenance and construction of the industrial tracks. However, it clearly appears that there were constant and repeated instances of repairs made to the industrial tracks prior to 1887, for which the Colorado Company paid its proportion upon the terms of the original decree. This was true as to the various and numerous tracks leading to the industries of the St. Louis Car Wheel Co. (Memo. 5, Tait's Ex. 5, Rec. 584); Hydraulic Press Brick Co. (Memo. 3, 5, Tait's Ex. 5, Rec. 583, 2nd Agreed Statement, par. 16, Rec. 355); Shovel Works (2nd Agreed Statement, par. 4, Rec. 350); Hoyt Metal Co. (2nd Agreed Statement, par. 10, Rec. 353, Memo. 7, Tait's Ex. 5, Rec. 584).

Likewise it clearly appears that there were constant and repeated instances where the cost of construction, repairs and maintenance upon industrial tracks constructed after January 1, 1887, for which the Colorado Company paid its proportion upon the terms

of the original decree. This was true as to the tracks leading to the industries of the Maguire Coal Co. (2nd Agreed Statement, par. 1, 2, Rec. 348, 349, Memo. 1, Tait's Ex. 4, Rec. 573); Reitz Cut Track (Tait's Ex. 1, Rec. 564); Harrison-Berry Co. (Tait's Ex. 1, Rec. 563, Memo. 13, Tait's Ex. 4, Rec. 578, 2nd Agreed Statement, par. 19, Rec. 356); Heinrich Coal Co., (Tait's Ex. 1, Rec. 566, 569, Tait's Ex. 4, Rec. 579, 582, Memo. 10, Tait's Ex. 5, Rec. 586); Gilsonite R. & P. Co. (Tait's Ex. 1, Rec. 567); Polar Wave Ice Co. (Tait's Ex. 1, Rec. 567, 568, 569, Memo. 9, Tait's Ex. 5, Rec. 585); Empire Brewing Co. (Memo. 10, Tait's Ex. 5, Rec. 586); Lumber Co. (Memo. 1, Tait's Ex. 5, Rec. 582); M. C. P. & C. (2nd Agreed Statement, par. 3, 16, Rec. 349, 355, Memo. 5, 7, Tait's Ex. 5, Rec. 584); Mound City P. & C. Co (2nd Agreed Statement, par. 3, 16, Rec. 349, 355); Hay Exchange (Memo. 7, Tait's Ex. 5, Rec. 584, 2nd Agreed Statement, par. 19, Rec. 356); Pacific Warehouse Co. (2nd Agreed Statement, par. 19, Rec. 356); Donk Bros. Coal Co. (2nd Agreed Statement, par. 16, 20, Rec. 355, 357, Memo. 12, Tait's Ex. 5, Rec. 586); Logwood De Camp Co. (2nd Agreed Statement, par. 23, Rec. 358, Memo. 12, Tait's Ex. 5, Rec. 586); American Pressed Brick Co. (2nd Agreed Statement, par. 24, Rec. 359); Tamm's Switch (Memo. 5, Tait's Ex. 5, Rec. 584), and Scruggs-McClure Coal Co. (Memo. 21, Tait's Ex. 4, Rec. 580).

Respectfully submitted,

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN,
Solicitors for Petitioners.

Received copy of foregoing petition for certiorari and brief in support thereof, and acknowledge receipt of notice that the same will be presented at the opening of court on November 16, 1908, or as soon thereafter as same can be heard.

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Solicitors for Wabash Railroad Company.

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Solicitors for the City of St. Louis.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY,
Petitioner,

CITY OF ST. LOUIS AND THE WABASH RAILROAD COMPANY,
Respondents.

No. 301.

BRIEF OF RESPONDENT, WABASH RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI.

WELLS H. BLODGETT,
JAMES L. MINNIS,
Solicitors for Respondent,
Wabash Railroad Company.

St. Louis Law Printing Co., 311-315 Lucas. Bell, Main 1919

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY,

Petitioner,

CITY OF ST. LOUIS AND THE WABASH RAILROAD COMPANY,

Respondents.

STATEMENT.

(1) On August 11th, 1875, the predecessor in title of the Wabash, St. Louis & Pacific Railway Company, (hereinafter called the Pacific Company), having located its railroad in the City of St. Louis from Union Station, westward about three miles to the east line of Forest Park, and purchased detached portions of a number of lots or blocks of ground for a right-of-way, acquired by contract a right-of-way forty-two feet wide over a part of Forest Park (from the east line northwesterly to the north line) on condition that it would

"permit under such reasonable regulations and terms as may be agreed upon, other railroads to use its right-of-way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies". This condition will hereafter be called the covenant and the terminus of the road will be referred to as Union Station. The right-of-way (between the east line of the park and Union Station) mentioned in the covenant was described in the contract as "a strip of ground twenty-eight or thirty feet wide". Additional ground was afterwards purchased which, with the detached parcels previously acquired, made a continuous strip from the east line of the park to Union Station. In some instances the company found it could purchase entire blocks or lots for about the sum asked for a narrow strip or right-of-way across them. and on this account the strip was of irregular width, but in the main twenty-eight or thirty feet wide. The Pacific Company constructed its main line and side or passing tracks on the strip twenty-eight or thirty feet wide mentioned in the covenant. It constructed a turn-table and some side tracks on adjacent land purchased in acquiring that strip.

(2) On May 29th, 1884, the jurisdiction of the Circuit Court was invoked in the case styled "Central Trust Company of New York *et al.* v. Wabash, St. Louis & Pacific Railway Company *et al.*", on the ground of diverse citizenship, and for the purposes of foreclosing the mortgages on the property and franchises of the Pacific Company, including the property above mentioned. Receivers were appointed who took charge of and operated the property, as is usual in such cases.

(3) On July 12th, 1886, the St. Louis, Kansas City & Colorado Railroad Company, (hereinafter called the Colorado Company), having constructed a railroad about twenty miles in length from Creve Coeur Lake eastward to a connection with the railroad of the Pacific Company at a point where it intersects the north line of Forest Park, demanded of the receivers permission to run its cars over the tracks on the right-of-way through the park and east of the park to Union Station, under and on the terms prescribed by the covenant. This demand was denied and thereupon the Colorado Company and the City of St. Louis filed a bill of intervention in the foreclosure suit, praying the Court to require by injunction the Pacific Company and its receivers to specifically perform the covenant in behalf of the Colorado Company. Issue was joined, the case referred and exceptions taken to the Master's report, and the cause submitted for decision. On December 31st, 1886, the Court rendered its decree, authorizing and permitting the Colorado Company "with its right-of-way, road, tracks, and property, engines and cars, loaded or empty, to make connection with" the Pacific Company "at the north line of said Forest Park and to use the said right-of-way tracks, switches, side tracks, turntables, turn-outs, and other terminal facilities of" the Pacific Company "between the north line of said park and 18th street on the terms, in the manner, and subject to the regulations in this decree set forth". The decree required the Colorado Company to pay as compensation six per cent on one-half of the value of the property to be used which, was fixed at one million dollars ($1,000,000). (See report of case, 29 Federal Reporter, 546; p. 296 *et seq.*, Transcript; see decree, p. 292 *et seq.*, Transcript.)

(4) From this decree the Pacific Company and its receivers appealed to this Court, where the decree was affirmed (see Joy v. St. Louis, 138 U. S. 1).

Thereupon the Colorado Company entered upon and continued to use the tracks and facilities above mentioned in dispatching its trains to and from Union Station.

(5) Following the construction of the railroad, an industrial district was built up in the territory between the east line of the park and Union Station. Some few industries were located along the main track, the greater number, however, being located some distance north and south of the main line.

The Wabash Railroad Company (herein called the Wabash Company) successor in title to the Pacific Company, **after** the decree was affirmed, constructed some eighty odd tracks to industries located some distance from the main line as a means of inducing patronage. The Colorado Company did not at any time prior to the filing of its second intervention hereafter mentioned, claim under the decree the right to use these industrial tracks with its engines and cars. The cars of the Colorado Company destined to and from these industries were handled by Wabash engines under an agreement between the operating officials of the two companies (p. 515, Transcript). The Wabash Company also constructed yards for storing and switching cars in connection with the operation of its lines west and east of the Mississippi River on ground between Union Station and the east line of the park acquired **after** the rendition of the decree.

(6) On the 17th day of October, 1902, the Colorado Company, having completed its line to Kansas City,

Missouri, filed in the foreclosure suit a second intervening bill, praying that the Wabash Company be required under the decree of December 31, 1886, to permit the Colorado Company to use for the purposes of its railroad, in addition to the property it was then and had been using, all the yards, industrial tracks and other facilities of the Wabash Company located between the east line of Forest Park and Union Station (p. 3 *et seq.*, Transcript). Issue was joined, testimony taken, and the cause came on for final hearing.

The Wabash Company contended: First, that the language "said right-of-way, tracks, switches, sidetracks, turn-outs, and other terminal facilities" of the Pacific Company "between the north line of said park and 18th street" was employed in the decree of December 31st, 1886, to designate the right-of-way through the park and the strip twenty-eight or thirty feet wide (bound by the covenant) between the east line of the park and Union Station, and the facilities thereon. Second, that the use decreed the Colorado Company comprehended only the dispatching of its trains to and from Union Station. Third, that the decree did not, in any event, entitle the Colorado Company to use any of the property, industrial or railway facilities, of the Wabash Company beyond the limits of the irregular strip of ground purchased by the Pacific Company in connection with acquiring its right-of-way between the east line of the Park and Union Station.

(7) On April 2nd, 1906, the case having been submitted, the Circuit Court handed down its decision sustaining the first and third contentions of the Wabash Company and denying the second, and entered its de-

cree interpreting the decree of December 31st, 1886, accordingly. (See 144 Federal Reporter, 476; also p. 593 *et seq.*, Transcript.)

From this decree the Colorado Company appealed to the Circuit Court of Appeals for the Eighth Circuit. On April 3rd, 1907, the Circuit Court of Appeals handed down its opinion by Judge Sanborn, Judge Hook dissenting. The majority opinion sustained the Court below in denying the second contention of the Wabash Company and then denied the first contention of that company on the ground that the language of the bill of intervention and the decree thereon December 31st, 1886, were sufficiently comprehensive to include the entire strip of ground owned by the Pacific Company between the east line of the park and Union Station at the time that decree was rendered, and the tracks and facilities thereon, but sustained the third contention of the Wabash Company that the decree of 1886 did not entitle the Colorado Company to use the industrial tracks and other facilities of the Wabash Company beyond the limits of that strip (see 152 Federal Reports, 849; page 603, *et seq.*, Transcript), and on June 5th, 1907, sent down its mandate reversing the decree of the Circuit Court and remanding the cause "with directions to enter a decree not inconsistent with the views expressed in the opinion of this court".

"The views expressed in the opinion" with respect to the scope the decree should cover were stated in the following language:

> "The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street which the Wabash owned or had acquired the right to use when the

decree of 1886 was rendered, and of the tracks, side tracks, turnouts, turntables and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company beyond the limits of that strip." (Page 619, Transcript.)

(The Pacific Company and its successor were referred to as the Wabash Company throughout the opinion.)

(8) On December 18th, 1907, the Colorado Company filed in the Circuit Court, presided over at the time by Judge Dyer (who did not preside in the trial of the cause), what is designated as "an amendment to the petition of the St. Louis, Kansas City & Colorado Railroad Company" (p. 597 *et seq.*, Transcript). This paper contains four paragraphs. The first and second paragraphs give a history of the litigation up to that time. We will quote the concluding sentence of the second paragraph: "The Court (Circuit Court of Appeals) in that opinion (Judge Sanborn's opinion) among other things held that under the decree of December 31st, 1886, set forth in the original petition, petitioner was entitled to enjoy the joint and equal use of the entire strip of land between the north line of Forest Park and 18th street in St. Louis, Missouri, which the Wabash, St. Louis & Pacific Railroad Company owned or had acquired the right to use when said decree was rendered, and all tracks, sidetracks, turn-outs, turn-tables, and terminal facilities now thereon, but was not entitled to the use under that decree of any of the property, industrial or railroad facilities of the Wabash Railroad Company beyond the limits of that strip." The remaining paragraphs are as follows:

"3. Petitioner is entitled to all the relief for which it prayed in its original petition, and neither the Circuit Court of Appeals nor this Court has any right to exclude it from the use and benefit under the decree of December 31st, 1886, of the property, industrial or railroad facilities of the Wabash Railroad Company beyond the limits of the strip mentioned, and any such construction of said original decree fails to give full faith and credit thereto, to which petitioner is entitled under and by virtue of the following provisions of the Constitution of the United States: Section 8, Article 1, Sections 1 and 2 of Article III; Section 1 of Article V and Article VI."

"4. Petitioner therefore shows that this case arises under the Constitution of the United States, and it hereby invokes the jurisdiction of this Court for the protection to which it is thereunder entitled, and asks that under said constitutional provisions full faith and credit be given to said decree of December 31st, 1886, and that it be accorded all the relief for which it originally prayed, including the right under said decree to the equal use and benefit of the property industrial or railroad facilities, from which said opinion of the Circuit Court of Appeals attempts to exclude it, and petitioner will ever pray, etc."

(9) On December 20th, 1907, the Circuit Court notwithstanding the so-called "amendment to the petition" rendered a decree in exact accordance with the mandate which, omitting formal parts, is as follows:

> The decree of December 31st, 1886, set out in the intervenor's application and motion is in full force and effect and is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant Wabash Railroad Company, its successors and assigns. The said Wabash Railroad Company, its officers, agents and employes are hereby enjoined to forthwith ac-

cord to the St. Louis, Kansas City and Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, the enjoyment of the joint and equal use of the entire strip of land between the east line of Forest Park and Eighteenth street in St. Louis, Missouri, which the predecessor of the Wabash Railroad Company owned or had acquired the right to use when the said decree of December 31st, 1886, was rendered, and of the tracks, side tracks, turnouts, turntables and terminal facilities now thereon, but is not entitled to the use under that decree of any of the property industrial, or railway facilities of the Wabash Railroad Company beyond the limits of that strip, and said Wabash Railroad Company, its officers, agents and employes, are enjoined from refusing to permit such use under the terms of said decree by said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns (page 625 Transcript).

On the same day the Colorado Company filed its assignment of errors and petitions for an appeal to this Court and also to the Circuit Court of Appeals for the Eighth Circuit, and the appeals were allowed. The assignment of errors complained that the Circuit Court "erred in each of the following rulings:

"1. In rendering the decree of December 20th, 1907, for that the same was contrary to the law and contrary to the evidence in the case.

2. In rendering and entering that portion of said decree providing, 'But it is not entitled to the use, under that decree, of any of the property, industrial or railway facilities of the Wabash Railroad Company, beyond the limits of that strip.'

3. In rendering and entering the said decree and particularly each portion thereof herein complained of, the Court failed to give full faith and credit to the decree of December 31st, 1886, and its affirmance to which appellant was entitled, under and by

virtue of the following provisions of the Constitution of the United States: Section 8, Article I; Sections 1 and 2 of Article III; Section 1 of Article V and Article VI'' (page 627 Transcript).

Thereafter, in due time, citations were served and the parties entered their appearances in this Court and the Circuit Court of Appeals.

(10) On the 26th day of September, 1908, the Wabash Company filed a motion in the Circuit Court of Appeals to dismiss the appeal pending in that court on the ground that the law does not authorize an appeal from a decree of the Circuit Court entered in exact accordance with the mandate of an appellate court. The Wabash Company has filed a motion to dismiss the appeal pending in this Court and respectfully request the Court to consider this brief in support thereof.

(11) The Colorado Company has presented to this Court a petition for a writ of *certiorari* praying that the Circuit Court of Appeals be required to send up the record of the appeal pending there.

In opposition to the petition for *certiorari* we make the following point and cite the following authorities:

POINTS AND AUTHORITIES.

THE PETITION SHOULD BE DENIED BECAUSE THE DECREE OF DECEMBER 20, 1907, IS A FINALITY AND NOT REVIEWABLE.

Texas & Pacific Ry. Co. v. Anderson, 149 U. S. 237, *l. c.* 241, 242;
Colo. Cent. Cons. Mining Co. v. Truck, 150 U. S. 138, *l. c.* 144;
Mason v. Pewabic Mining Co., 153 U. S., *l. c.* 159;
Rouse v. Letcher, 156 U. S. 47, *l. c.* 49, 50;
Rouse v. Hornby, 161 U. S. 588, *l. c.* 591;
Webster v. Daley, 163 U. S. 155, *l. c.* 159;
Press Publishing Co. v. Monroe, 164 U. S. 105, *l. c.* 112;
Re Jones, 164 U. S. 691, *l. c.* 693–694;
United States v. New York Indiana, 173 U. S. 464, *l. c.* 473;
Carter v. Roberts, 177 U. S. 496, *l. c.* 500;
Loeb v. Columbia Twpt., 179 U. S. 472, *l. c.* 478;
Good Shot v. United States, 179 U. S. 87, *l. c.* 88;
Central Trust Co. v. Grant Locomotive Works, 135 U. S. 227;
Re Washington & G. R. Co., 140 U. S. 91, *l. c.*;
Washington Bridge Co. v. Stewart, 3 How. 413, *l. c.* 424;
Re Sanborn Fork & Tool Co., 160 U. S. 247, *l. c.* 255;
Thompson v. Maxwell Land Grant R. Co., 168 U. S. 451, *l. c.* 456.

ARGUMENT.

We will briefly discuss our point:

THE PETITION SHOULD BE DENIED BECAUSE THE DECREE OF DECEMBER 20, 1907, IS A FINALITY AND NOT REVIEWABLE.

The facts necessary to a determination of the questions involved are admitted in petitioner's brief.

(1) We quote from page 9:

> "After the rendition of the decree (of December 3, 1886) sought to be enforced, and before the filing of the petition (in the present suit) to enforce it, the Circuit Court of Appeals was established, so that in the absence of a constitutional or jurisdictional question, the case had to be appealed to that court (Mason v. Pewabic Mining Co., 153 U. S. 361, 38 L. Ed., 745). This because no constitutional question having been raised, the jurisdiction as to an intervener was to be determined by that of the main cause, which jurisdiction had been invoked because of diverse citizenship (Gregory v. Van, 160 U. S. 643, 40 L. Ed. 566; Cary v. R. Co., 161 U. S. 115, 40 L. Ed. 638; Rouse v. Hornsby, 161 U. S. 583, 40 L. Ed. 817; Pope v. L. & N. R. Co., 173 U. S. 173, 43 L. Ed. 814).

By this language petitioner admits that the jurisdiction of the Circuit Court in the original case, wherein petitioner filed its intervening bill, depended entirely upon diverse citizenship of the parties, and concedes as a matter of law that the jurisdiction of the intervention suit must be ascribed to the same grounds.

(2) We quote from page 10:

> "This, then, being a decree of reversal" (decree of the Circuit Court of Appeals) "was not final, so

that this court would not **then** take jurisdiction by *certiorari*, the controversy being between private parties (C. & N. W. R. Co. v. Osborne, 146 U. S. 354, 36 L. Ed. 1002; Forsythe v. Hammond, 166 U. S. 506–574, 41 L. Ed. 1095, 1098; Taylor v. Louisville, Etc., R. Co., 173 U. S. 648, 43 L. Ed. 1182).

By this language petitioner admits that the controversy involved on the appeal to the Circuit Court of Appeals which was adjudicated by the decree rendered in the Circuit Court December 20th, 1907, was a private one between private parties, and for that reason was not and could not have been properly removed by *certiorari* to this court.

(3) We quote from page 12:

"The Circuit Court entered the decree (Rec. 625, 626) in conformity with the opinion of the Circuit Court of Appeals."

On pages 625 and 626 of the Record will be found the mandate of the Circuit Court of Appeals which remanded the cause to the Circuit Court with directions to enter a decree not inconsistent with the views expressed in the opinion.

(4) We quote from pages 12 and 13:

"Doubtful as to the forum to which the case should be appealed, two appeals were taken, one to the Circuit Court of Appeals, which is now sought to be removed by *certiorari*, and the other directly to this court, where it was filed January 17, 1908, and was regularly docketed as No. 253 at the October, 1908, Term."

By this language petitioner admits that the appeal sought to be removed by *certiorari* to this court was

taken to the Circuit Court of Appeals from the decree of the Circuit Court entered December 20, 1907, in exact conformity with the mandate and that no subsequent proceedings were had in the Circuit Court.

The question is whether that decree is a finality or one that may be reviewed.

The first paragraph of Section 6 of the Judiciary Act of March 3, 1901 (U. S. Comp. Stat. 1901, p. 549), provides that "the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit * * * being * * * citizens of different states". The second provides that "it shall be competent for the Supreme Court to acquire by *certiorari* or otherwise any such case to be certified to the Supreme Court for its review and determination * * *."

Under the admitted facts and these provisions of the statute, the decision of the Circuit Court of Appeals embodied in the decree entered in the Circuit Court on December 20th, 1907, is final and therefore concluded the litigation.

> Rouse v. Hornby, 161 U. S. 588, *l. c.* 591;
> Press Pub. Co. v. Monroe, 164 U. S. 105, *l. c.* 112;
> Rouse v. Letcher, 156 U. S. 47, *l. c.* 49–50.

And this is true if we concede that the decree of December 20, 1907, involved the construction and application of a decree entered pursuant to a mandate of this Court (Mason v. Pewabic Mining Co., 153 U. S. 361, *l. c.* 366), or that a constitutional question arose in the course of the proceedings (Colo. Central Consol. Mining Co. v. Turck, 150 U. S. 138, *l. c.* 114; *re* Jones; 164 U. S. 691, *l. c.* 694; Loeb v. Columbia Twp., 179 U. S. 472).

This would also be true with respect to a decree entered pursuant to the mandate of the Circuit Court of Appeals in any case within its jurisdiction (Carter v. Roberts, 177 U. S. 496, *l. c.* 500).

In the latter case this Court said:

> "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Court of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. Holt v. Indiana Manufacturing Company, 46 U. S. App. 717; 176 U. S. 68; United States v. John, 155 U. S. 109; New Orleans v. Benjamin, 153 U. S. 411; Benjamin v. New Orleans, 169 U. S. 161. But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by *certiorari* to or appeal from that court in accordance with the act of March 3, 1891."

What is here said rests upon elementary grounds.

The decrees of the Circuit Court of Appeals, in cases within its jurisdiction, like the decrees of other courts, are conclusive on the parties. The matters which pass into judgment there, are *res adjudicata*. The defeated party cannot, on the coming down of the mandate, renew the litigation by an alleged amendment to the petition, asking the trial court, to reverse the decision of the Circuit Court of Appeals, as attempted in the case at bar.

Tex. & Pac. R. Co. v. Anderson, 149 U. S. 237, *l. c.* 241;

Re Sanborn Fork & Tool Co., 160 U. S. 247, *l. c.* 255;

Thompson v. Maxwell, Land Grant & R. Co., 168 U. S. 451, *l. c.* 456.

The decree, then, being a finality, is not subject to review either in this Court or the Circuit Court of Appeals, and for that reason the orders purporting to allow appeals therefrom are void.

U. S. v. N. Y. Indians, 173 U. S. 464, *l. c.* 473;
Tex. & Pac. Ry. Co. v. Anderson, 149 U. S. 237, *l. c.* 241 & 242;
Carter v. Roberts, 177 U. S. 496, *l. c* 500;
Webster v. Daley, 163 U. S. 155, *l. c.* 159.

Besides, the record petitioner seeks to bring up does not present a question for review. The Circuit Court performed no act except to enter the decree in accordance with the mandate, and that act is the only one complained of in petitioner's assignment of errors (see Statement and p. 627 of Transcript). The propriety of that act is not subject to review, whether it be regarded as the act of the Circuit Court (Washington Bridge Co. v. Stewart, 3 How, 413, *l. c.* 424) or the Circuit Court of Appeals (Webster v. Daley, 136 U. S., 165, *l. c.* 159).

Learned solicitors for petitioner concede that the record sought to be removed does not present to the Circuit Court of Appeals any question for review, but base their case on the assertion that "instead of this being a reason for refusing to grant the writ (of *certiorari*) it is one for granting it" (p. 4 their Brief).

We believe a contention so obviously unsound cannot be supported by anything said in the numerous cases cited by the learned solicitors for petitioner, and for

that reason we will not examine them. (See Good Shot v. United States, 179 U. S. 87, *l. c.* 88.)

We respectfully submit that the petition for writ of *certiorari* should be denied and that the motion to dismiss the appeal pending in this Court should be sustained.

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James L. Minnis
Solicitors for Respondent,
Wabash Railroad Company.